United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

76-7161

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-7161

FLM COLLISION PARTS, INC.,

Plaintiff-Appellee-Cross-Appellant,

—against—

FORD MOTOR COMPANY and
FORD MARKETING CORPORATION,

Defendants-Appellants-Cross-Appellees.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
(D.C. 73 Civ. 713 (T.P.G.))

JOINT APPENDIX

VOLUME V

§ 7 Opinion of the Court and Post-Opinion Developments

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§ 7 OPINION OF THE COURT AND POST-OPINION DEVELOPMENTS

Opinion of Judge Griesa on Liability,
December 19, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FLM COLLISION PARTS, INC.,

Plaintiff,

v. 73 Civ. 713

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants. OPINION

GRIESA, J.

This is an antitrust action under Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Antidiscrimination Act, 15 U.S.C. § 13(a) (hereafter referred to as Section 2(a) of the Robinson-Patman Act), and Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2.

Plaintiff FLM Collision Parts, Inc., is a small company located in Yonkers, New York, and is in the business of dealing in "crash parts" for cars made by defendant Ford Motor Company -- i.e., Ford, Mercury and Lincoln cars. Crash parts consist of fenders, grills, panels, and other parts used to repair a car which has been in an accident or needs replacement of such parts for some other reason.

These crash parts are manufactured only by Ford Motor Company or by other manufacturers who make the parts to Ford's specifications. With certain exceptions not here relevant, these crash parts are sold by Ford[1] only to franchised Ford and Lincoln-Mercury dealers. The franchised dealers[2] either use the crash parts in their own repair work for customers, or resell them to independent repair shops.

The problem in this case arises from the circumstances under which Ford grants a so-called "wholesale incentive" allowance in the sale of crash parts to Ford dealers. Ford grants, or does not grant, the wholesale incentive allowance to the dealers depending on the use they make of the particular parts. If a dealer uses a part in repair work for a customer, this involves a retail sale of the part, and the dealer does not obtain a wholesale incentive allowance on that part. But if a dealer sells the part to an independent repair shop, this involves a wholesale transaction, and the dealer may obtain the wholesale incentive allowance on that part.

FLM set itself up to supply Ford crash parts to independent repair shops. At first it sought to buy directly from Ford, but when this request was refused, FLM commenced purchasing crash parts from a Ford dealer in Brooklyn to whom FLM was referred by Ford. FLM then proceeded to sell crash parts, purchased from the Brooklyn dealer, to independent repair shops, mainly in Bronx and Westchester counties.

The wholesale incentive allowance was established by Ford in 1968. Thereafter, until 1972, Ford permitted the Brooklyn Ford dealer to receive the wholesale allowance on parts sold to FLM, which allowance was almost entirely passed on to FLM, thus substantially reducing FLM's costs. Commencing in 1972, Ford refused to grant the wholesale incentive allowance on parts sold to FLM, and restricted the allowance to those parts which were sold by franchised Ford dealers directly to independent body shops.

FLM contends in this action that Ford's current pricing policies violate Section 2(a) of the

Robinson-Patman Act in two regards: First, that Ford, by charging one price to a franchised dealer when it sells to an independent repair shop, and a higher price to a franchised dealer when it sells to FLM, is engaging in unlawful price discrimination in its sales to the franchised dealers, resulting in injury to FLM for which FLM has standing to recover; second, that FLM is itself a "purchaser" from Ford -- i.e., an "indirect" purchaser -- and as such has standing to sue Ford under the Robinson-Patman Act. FLM further contends that Ford has violated Section 1 of the Sherman Act in combining and conspiring with its franchised dealers to injure FLM competitively. Finally, FLM contends that Ford has violated Section 2 of the Sherman Act in that Ford has monopolized or attempted to monopolize the wholesale market for Ford crash parts. FLM seeks injunctive relief and treble damages.

The case has been tried to the Court without a jury. This opinion constitutes the Court's findings of fact and conclusions of law on the liability phase of the case. The record on damages has not been completed. A supplemental opinion will be issued on the award of damages, including attorneys' fees.

Summary of Conclusions

The following is a summary of my conclusions. I hold that FLM has proved a violation of Section 2(a) of the Robinson-Patman Act based upon the first theory described above -- that Ford is engaging in unlawful price discrimination in sales of crash parts to its dealers, resulting in injury to FLM for which FLM has standing to sue. I reject the Robinson-Patman claim of FLM based on the "indirect purchaser" theory. I also reject FLM's claims under both Sections 1 and 2 of the Sherman Act.

Facts

FLM commenced its business in 1965. The two principals of the company are Stephen McKee and John Andidero, both of whom had been employed previously by Ford dealers in parts operations. FLM's first idea was to buy crash parts directly from Ford and sell them to independent repair shops. FLM discussed this with a

representative of Ford, but was advised that Ford would only sell its crash parts to franchised dealers. In early 1965 an employee of Ford in New York City by the name of Joe Collura introduced McKee and Andidero to Central Lincoln Mercury Corp., located in Brooklyn, New York. This led to an arrangement for FLM to buy crash parts from Central at 2% over Central's cost.

At this time there was no wholesale incentive allowance available on crash parts to franchised Ford dealers. The dealers paid the same price -- "dealer price" -- for crash parts whether they used them in their own repair shops (i.e., made retail sales) or sold them to independent repair shops (made wholesale sales). The "dealer price" was the "suggested list" or retail price, less 42%.[3]

It is useful to examine the effects of the crash parts price structure as it existed at the time FLM commenced business in 1965 until the advent of the wholesale incentive allowance, which was instituted in 1968. Let us assume the sale by Ford of a crash part to a dealer, carrying a suggested list price of $10.

The dealer would pay the dealer price of $5.80 -- i.e., the suggested list price less 42% or $4.20. The Ford dealer could use the part in his own repair operation, and would presumably charge the customer the suggested list price of $10, thus making a gross profit of $4.20. The Ford dealer could also sell the part to an independent repair shop. In such a sale the Ford dealer would presumably make some markup over the dealer cost of $5.80. The inevitable result would be that the Ford dealer and the independent repair shop, both potentially competing for the repair business of Ford owners, would be incurring different costs for the same type of crash part-- the dealer paying $5.80, the repair shop $5.80 plus.

To return to the situation of FLM, FLM was buying parts from Central Lincoln Mercury for 2% over dealer price. Using the same $10.00 part as an example, FLM would purchase this part for the dealer cost of $5.80 plus the 2% markup, or a total of $5.92. FLM would be competing with franchised Ford dealers for the business of the independent repair shops. Although there is

no explicit testimony about the price which FLM was charging to repair shops in its early years, a reasonable inference from the evidence is that this was suggested retail price less 25%. Applying this percentage to the hypothetical $10.00 part would give the figure of $7.50 as FLM's price to the repair shops, for a part costing it $5.92.

With respect to FLM's competition with Ford dealers for the business of independent repair shops, there is no explicit evidence regarding what prices the dealers were charging to the independent repair shops during this period. However, the reasonable inference is that FLM's prices were at about the same level as the prices charged by the Ford dealers. In any event, FLM was able to compete effectively.

The business of FLM grew steadily. FLM offered certain services to the independent repair shops which the franchised Ford dealers generally did not provide. FLM would visit repair shops, inspect damaged vehicles and advise respecting exactly what parts would

be needed to make the proper repairs. FLM carried sufficient inventory so that it could often fill an order the same day it was placed. If FLM did not have a part in its own inventory, it would attempt to procure the part and deliver it no later than the following day. FLM delivered parts to the repair shops, something apparently not done by most of the franchised dealers.

The following figures show the results of FLM's operations commencing with the fiscal year ending September 30, 1966 (the first full year of FLM's operations) through the fiscal year ending September 30, 1968. The latter was the last full year prior to the advent of the wholesale incentive allowance.

Fiscal 1966

Sales	$245,738.00	
Cost of Parts	$201,376.00	
Gross Profit	$44,362.00	(18.1%)
Other Expenses (including officers' salaries of $16,680)	$44,256.00	
Net Operating Profit After Taxes	$80.70	

Fiscal 1967		
Sales	$337,257.00	
Cost of Parts	$276,121.00	
Gross Profit	$61,136.00	(18.1)
Other Expenses (including officers' salaries of $23,520)	$60,927.00	
Net Operating Profit After Taxes	$109.00	

Fiscal 1968		
Sales	$389,987.00	
Cost of Parts	$323,959.00	
Gross Profit	$66,028.00	(16.9%)
Other Expenses (including officers' salaries of $26,520)	$65,858.00	
Net Operating Loss After Taxes	-$769.00	

Ford maintained a parts depot at Teterboro, New Jersey. Central Lincoln Mercury provided FLM with an authorization so that FLM could pick up parts at Teterboro. Bills were rendered by Ford to Central, who would then segregate the bills relating to the FLM purchases from the bills relating to other purchases made by Central. In its dealings with Ford, Central was identified by a "dealer code number" -- 11283.

In order to simplify the accounting for the FLM purchases, Central requested that a separate code number be given by Ford to Central for the parts which it purchased for resale to FLM. Ford agreed to this, and commencing in late 1968, Ford assigned a second code number to Central -- 13430. This code number was in the name of Central, but the billing address was the address of FLM in Yonkers.

The wholesale incentive allowance for crash parts was instituted in November 1968. At some time

prior thereto, the Federal Trade Commission advised Ford that the distribution of crash parts to independent repair shops at higher prices than those charged to franchised dealers for use in the dealers' repair shops violated Section 5 of the Federal Trade Commission Act. No formal proceedings were instituted. The matter was settled when Ford agreed to allow a discount from dealer's prices for certain classes of crash parts when the franchised dealers resold such parts for use by independent repair shops. The amount of this wholesale incentive allowance on crash parts was initially set at 20%. It applied to some, but not all, crash parts. The record shows that in 1971 there were a total of 10,100 kinds of crash parts sold by Ford, of which about 4,800 were eligible for a wholesale incentive allowance.

The agreement between Ford and the Federal Trade Commission did not expressly provide whether or not a wholesale incentive allowance should be allowed in the event of sales by a Ford dealer to a party such as FLM, acting as middleman between the Ford dealer and the independent repair shop. However, it has been

stipulated that from the inception of the wholesale incentive allowance for crash parts until a Ford policy change in mid-1971, a franchised Ford dealer reselling crash parts to FLM was entitled to claim the wholesale incentive allowance on such resales.

In 1968 Ford changed the amount of the discount used to reach the basic dealer price from 42% to 40%. Thus, after 1968, the basic dealer price on a part whose suggested retail price was $10.00 was $6.00 instead of $5.80. In January 1970 Ford increased the wholesale incentive allowance from 20% to 25% for those crash parts to which the allowance applied.

The wholesale incentive allowance was obviously a great benefit to FLM. This is illustrated by returning to our example of the $10.00 crash part. The price paid by FLM's supplier, Central, was $6.00. However, when Central sold this part to FLM, Central received a wholesale incentive allowance equal to 25% (using the post-January 1970 percentage) of the $6.00 -- or $1.50. Thus Central paid only $4.50 for the part. Following the institution of the wholesale incentive allowance, Central charged FLM a markup of 3% of the basic dealer price -- here $6.00.

In the example this markup would be 18¢. Thus FLM paid Central $4.68. As already noted, it appears that the wholesale incentive allowance was granted by Ford on only about half the crash parts sold by Ford. Obviously, in the example of the $10.00 part, if the wholesale incentive allowance were not in effect, FLM would pay $6.18.

With regard to FLM's resale prices to the repair shops, and the resale prices of FLM's competitors, the Ford dealers selling directly to the repair shops, there is no explicit evidence in the record as to what such prices were during the time FLM was receiving the benefit of the wholesale incentive allowance. The Federal Trade Commission had contemplated that, following the institution of the wholesale incentive allowance, the Ford dealers would reduce their prices on the covered parts to the same level paid by the Ford dealers when these dealers sold at retail. In the example of the $10.00 part this would be $6.00. The Commission contemplated that, if the Ford dealer obtained a further wholesale

[The next page is 14A]

incentive discount when the part was sold to independent repair shops, the dealer could afford to resell the part to the repair shops at the $6.00 price.

Apparently there was substantial unwillingness on the part of Ford dealers to reduce the prices charged to the repair shops to the levels contemplated by the Federal Trade Commission. Since the present case does not involve a complaint by an independent repair shop regarding prices charged by a Ford dealer, this issue was not pursued in any depth at the trial.

The only relevance of this matter to the present case is to explain that after the institution of the wholesale incentive allowance for crash parts in 1968, the prices charged by the Ford dealers, at least in FLM's area of competition, do not appear to have been reduced substantially. It appears likewise that FLM did not reduce its prices substantially, and that the principal effect of the wholesale incentive allowance on FLM was to increase its profitability.

The following figures show the profit pictures of FLM after the wholesale incentive discount became effective. Again, the fiscal years refer to years ending September 30.

Fiscal 1969

Sales	$483,015.00	
Cost of Parts	$345,112.00	
Gross Profit	$137,903.00	(28.6%)
Other expenses (including officers' salaries and commissions of $39,360)	$96,752.00	
Net Profit After Taxes	$25,418.00	

Fiscal 1970

Sales	$620,769.00	
Cost of Parts	$444,865.00	
Gross Profit	$175,904.00	(28.3%)
Other Expenses (including officers' salaries and commissions of $62,700)	$141,106.00	
Net Profit After Taxes	$22,847.00	

Fiscal 1971

Sales	$654,382.00	
Cost of Parts	$448,264.00	
Gross Profit	$206,118.00	(31.5%)
Other Expenses (including officers' salaries of $83,200)	$179,938.00	
Net Profit After Taxes	$18,699.00	

Fiscal 1972

Sales	$736,967.00	
Cost of Parts	$490,347.00	
Gross Profit	$246,620.00	(33.5%)
Other Expenses (including officers' salaries of $83,200)	$194,232.00	
Net Profit After Taxes	$21,091.00	

It should be noted at this point that Ford markets a wide variety of spare parts other than crash parts. These other parts include spark plugs, filters, carburetors, etc., and are marketed under the Ford brand name and under the brand names "Autolite" and "Motorcraft". Wholesale incentive allowances on the spare parts other than crash parts had been instituted prior to 1968.

The Ford witnesses have testified that commencing in 1969 Ford found that wholesale incentive allowances were running higher than had been estimated. In 1969 the total wholesale incentive allowances granted by Ford for all types of parts amounted to $45.8 million, of which $12.7 million related to crash parts.

Ford was concerned about possible large-scale violations by dealers of Ford's rules regarding the wholesale incentive allowance. Ford's rules prohibited, among other things, payment of the allowance on parts sold by one Ford dealer to another Ford dealer either directly or through an intermediary. Ford was concerned about the possibility of one Ford dealer obtaining the allowance for purported use in wholesale sales, and then transferring the parts to another Ford dealer, who would sell them at retail. In this instance, the first Ford dealer would simply be a conduit, and the second Ford

dealer would be getting the benefit of the allowance although not making the wholesale sales which the allowance was intended to cover.

Another "abuse" of the wholesale incentive allowance, in Ford's view, was the claiming of the allowance by Ford dealers for parts sold to insurance companies in connection with the repair of cars. Ford regarded these as retail sales, ineligible for the allowance. Still another abuse was claiming the wholesale incentive allowance on parts which had not been purchased from Ford.

In 1969 Ford selected 37 out of its 6700 dealers for audits to determine the validity of the wholesale incentive allowances the selected dealers had claimed. These 37 dealers were ones with unusually high claims for wholesale incentive allowances.

Central Lincoln Mercury, FLM's supplier, was one of the dealers audited. This audit covered not only the records of Central, but also the records of FLM. FLM consented to such an examination. It is conceded by the Ford witnesses that the amount of incorrect wholesale allowance claims involving FLM was "minimal" and that this was a "clean audit." The audit covered the period from November 1968 through September 1969. The finding of the audit report dated November 21, 1969 was that there were total "discrepancies" of

$2,185.23, of which $1,458.34 related to sales to Ford dealers. The balance of the discrepancies related to "return sales not deducted." There were no discrepancies arising from sales to insurance companies or purchases from outside sources. For some reason, the audit report does not disclose the total amount of wholesale incentive allowances claimed with regard to FLM for the November 1968 - September 1969 period, although the audit report states that for the period January through May 1969 the total claims were $24,446. In any event, the amount of the discrepancies was considered minimal as compared with the total claims.

Following the completion of the 37 audits, Ford made a statistical evaluation in order to estimate the overall proportion of improper wholesale allowance claims for all dealers. The estimate was that for the period of the audit there were between $1.2 million and $2.1 million in improper claims out of a total of $44.5 million claims.

In the fall of 1970 there was a second audit of Central and FLM, resulting in an audit report dated

November 6, 1970. The audit report stated that the wholesale incentive claims "were tested and found to be generally accurate, properly supported, and submitted in accordance with the provisions of the wholesale parts incentive program." No discrepancies were noted.

During 1970 Ford undertook a reconsideration of the second parts code number which had been issued to Central for use in connection with its sales to FLM. The second code number was discontinued as of the end of January 1971. Central continued to sell to FLM and to obtain the wholesale incentive allowance on sales to FLM until a subsequent time, as will now be described.

In July 1971 Ford amended its rules regarding the wholesale incentive allowance, with the effect that a Ford dealer could not obtain the allowance on parts sold to a party such as FLM. It is this amendment that has given rise to the present action.

Ford asserts that this change regarding the wholesale incentive allowance was the result of three

considerations. The first of these was the concern that a party such as FLM might act as an intermediary in transfers of parts between Ford dealers. The second consideration was that a Ford dealer selling to a party such as FLM was not really performing the "wholesale function," but was delegating this function to a middle-man such as FLM. The third consideration was that, if Ford dealers were allowed to obtain a wholesale incentive allowance in selling to a party such as FLM, who was acting as a wholesaler, the Ford dealer would not be content with the wholesale allowance, but would demand an even greater allowance -- a distributor's allowance.

The only witness at the trial who participated in the discussions of these matters within Ford was Morris J. Rowlands. He testified that he could recall no specific discussion of FLM in connection with the amendment of the wholesale incentive allowance rules in July 1971. He testified that the discussions were in general terms, in order to arrive at a consistent overall policy applicable to all types of spare parts, including but not limited to crash parts.

Certain facts should be noted with respect to the three considerations described above. As to the first, there was not the slightest indication that FLM was either actually or potentially the kind of intermediary between Ford dealers which Ford was concerned about. It is undisputed that FLM, aside from an occasional sale to a Ford dealer in an emergency, sold its crash parts entirely to independent repair shops. The "discrepancies" found in the 1969 audit were minimal, and in the 1970 audit were nonexistent.

As to the second consideration -- Ford's alleged desire to grant the wholesale incentive allowance only where Ford dealers are performing what Ford considers to be the "wholesale function" -- this raises a question of law, to be discussed hereafter, as to whether Ford is legally entitled to use the wholesale incentive allowance in such a way as to insure that a Ford dealer sells directly to a retailer rather than selling indirectly through a party such as FLM.

As to the third consideration -- Ford's fear that Ford dealers selling to wholesalers would claim a

distributor's allowance -- Ford admits that, whatever this problem may have been, it related in no way to crash parts or to FLM. Ford's evidence is that it was concerned in this regard about Autolite and Motorcraft, where one channel of distribution involved distributors. Ford allegedly believed that if Ford dealers were encouraged to compete with the distributors in marketing Autolite and Motorcraft parts to wholesalers, then the Ford dealers would claim a distributor's allowance. Thus Ford was not willing to grant any incentive at all to Ford dealers in order to encourage them to sell these parts to wholesalers.

Ford contends that, although this problem did not relate directly to FLM or to crash parts, Ford desired to have a uniform policy for the wholesale incentive allowance applicable to all types of parts, rather than to have one policy for crash parts and a different policy for Autolite and Motorcraft parts.

I must note here that, even as to the Autolite and Motorcraft parts, there is no showing that any Ford dealers were in fact demanding distributors' allowances for sales of spare parts to wholesalers.

In any event, as already described, Ford's rules were changed in July 1971 to provide that a Ford dealer could obtain the wholesale incentive allowance on parts which were sold directly to independent repair shops, but could not obtain the allowance for parts sold to parties such as FLM, who would resell them to the independent shops.

Although Ford denies that this change of policy was specifically directed to FLM, it should be noted that there was no other company besides FLM who had successfully established a business of acting as middleman between Ford dealers and independent repair shops in the sale of crash parts.

Apparently because of some administrative error on the part of Ford, the July 1971 change of policy was not immediately enforced with regard to sales by Central to FLM. Central continued to sell crash parts to FLM and to receive wholesale incentive allowances on such sales.

In July 1972 the business of Central Lincoln Mercury was taken over by Atlas Lincoln-Mercury. It was agreed between Atlas and FLM that Atlas would make sales to FLM in the same way that Central had done.

At some point in the summer or fall of 1972 Ford awoke to the fact that Atlas was still claiming and receiving wholesale incentive allowances on sales of parts to FLM, contrary to Ford's current policy. Ford approached Atlas and proposed to charge back some $24,000.00 in wholesale incentive allowances which had been paid to Atlas. Atlas argued that FLM was a valuable wholesale account and urged that the wholesale incentive allowance should be continued with respect to sales to FLM. Atlas particularly resisted any charge-back of allowances already paid. These discussions between Ford and Atlas occurred in late October 1972.

During this controversy, Atlas held up certain payments of wholesale incentive allowances to FLM. As a result, FLM held up certain payments which were due to Atlas. Apparently at some point the Ford depot at Teterboro, New Jersey refused to deliver parts to FLM for the account of Atlas.

FLM's attorney approached Ford requesting the continuation of the wholesale incentive allowance on sales to FLM and also complaining about the refusal

of the Teterboro depot to deliver parts to FLM. Ford advised FLM's attorney that it would not negotiate directly with a representative of FLM, but would negotiate only with its dealer.

The upshot of these events was as follows. Ford persisted in its refusal to allow the wholesale incentive allowance on parts sold by Atlas, or any other dealer, to FLM. Ford withdrew its claim of charge-back against Atlas. The business relationship between Atlas and FLM was terminated.[5] All this occurred by the end of November 1972.

Subsequently FLM has purchased crash parts from certain Ford dealers without getting the benefit of the wholesale incentive allowance. Commencing in November 1972 FLM purchased parts from Thomas Motors and Parkview Lincoln-Mercury, both of Yonkers, New York. FLM paid Thomas and Parkview 5% over dealer cost. FLM dealt with Thomas Motors until June of 1973, when a new owner of that agency terminated the account. It appears that FLM continues to purchase parts from Parkview Lincoln-Mercury to the present time.

In June 1973 FLM commenced purchasing parts from Pleasantville Ford of Pleasantville, New York. Again, FLM pays Pleasantville 5% over dealer cost. FLM continues to deal with Pleasantville to the present time.

With respect to parts which FLM has purchased from Thomas Motors, Parkview Lincoln-Mercury and Pleasantville Ford, FLM has resold these parts to independent repair shops for 25% off the suggested list or retail price.

The withdrawal of the wholesale incentive allowance had a detrimental effect on FLM's profitability. The financial results for the fiscal year ending September 30, 1973 were as follows:

Fiscal 1973

Sales	$798,947.00	
Cost of Parts	$684,758.00	
Gross Profit	$114,189.00	(14.3%)
Other Expenses (including officers' salaries of $82,860.00)	$199,896.00	
Net Loss	($85,707.00)	

As of November 1, 1973, the salaries of the two officers were reduced from $800.00 per week each to $600.00 per week each. Contributions to pension funds were suspended.

At the time of the trial the final figures of FLM for fiscal 1974 were not available. However, it was estimated that sales for fiscal 1974 were approximately $694,000.00. The fiscal 1974 sales were down approximately $100,000.00 from the fiscal 1973 level. It was estimated that, at the end of fiscal 1974, FLM would have a deficit in its earned surplus account amounting to $18,607.00, after a $20,000.00 income tax refund. This contrasts with an earned surplus of $81,913.00 as of September 30, 1972.

FLM is suffering from a shortage of working capital which has restricted its ability to purchase inventory and equipment. With regard to price competition with Ford dealers for the business of repair shops, FLM is generally charging the repair shops the suggested retail price less 25%. McKee of FLM has testified, albeit in a general way, that FLM is experiencing price competition from some Ford dealers which FLM cannot afford to meet.

I find that FLM has suffered impairment of its ability to compete effectively in the wholesale market of Ford crash parts.

FLM has sought to prove that Ford's withdrawal of the wholesale incentive allowance resulted at least in part from complaints from Ford dealers competing with FLM and a desire by Ford to protect such dealers. There is no sufficient proof to support this point. However, it is clear that Ford understood in general that its discontinuance of the wholesale incentive allowance on crash parts sold to parties such as FLM would substantially impair the ability of such parties to participate in the distribution of Ford parts in competition with the regular Ford dealers. Also I cannot believe that the Ford personnel responsible for the change of policy respecting the wholesale incentive allowance did not have FLM specifically in mind as a shining example of the type of successful middleman Ford was attempting to discourage.

Conclusions of Law

Robinson-Patman Act

Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 13(a), provides in pertinent part:

> (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: . . ."

It is not disputed that, since November 1972, Ford has charged to Ford dealers who sell to FLM a higher price than Ford charges for the same crash parts when a Ford dealer sells directly to an independent body shop. Putting aside for the moment the question of the purpose of Ford's price differentials, it would appear at least that the basic elements of a Section 2(a) violation are made out. Ford charges

different prices to different purchasers -- Ford dealers -- for the same crash parts.

Ford asserts two defenses to the Robinson-Patman Act claim: First, that FLM has no standing to assert such a claim, since FLM is not a purchaser from Ford; second, that Ford's price differentials are not prohibited by Section 2(a) since they involve "functional discounts."

a. The Standing of FLM to Sue

For its argument against FLM's standing to sue, Ford relies upon dicta in a line of cases commencing with Klein v. Lionel Corp., 237 F.2d 13 (3rd Cir. 1956). The opinion of the Third Circuit contains the statement (pp. 14-15):

> "The decisions of many cases have crystalized the rule that an individual can have no cause of action under Section 2(a) of the Clayton Act unless he is an actual purchaser from the person charged with the discrimination." (footnote omitted)

This statement was cited with approval in dicta in Baim & Blank, Inc. v. Philco Corp., 148 F.Supp. 541, 543 (E.D.N.Y. 1957); Bolick-Gillman Co. v. Continental Baking Co., 206 F.Supp. 151, 154 (D. Nev. 1961); United Banana Co. v. United Fruit Co., 245 F.Supp. 161, 168 (D. Conn. 1965).

For reasons to be described hereafter, I am not at all certain that the Third Circuit intended to lay down any rule about standing under Section 2(a) as sweeping as the literal language of the dictum might indicate. In any event, I have concluded that any such rule is contrary to the intention of Congress as expressed in the Robinson-Patman and Clayton Acts.

Although Section 2(a) defines the conduct which is illegal, it does not explicitly deal with the question of what parties do or do not have standing to sue for violations. The statutory provision expressly dealing with the question of standing is Section 4 of the Clayton Act, 15 U.S.C. § 15, which provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

On its face, Section 4 of the Clayton Act would appear to be broad enough to provide for a civil action by any party who could make out a factual case of injury to his "business or property" by reason of any violation of the antitrust law. However, the courts have taken the view that Congress did not intend to confer such broad standing. See Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972) ("target area" doctrine applied in Sherman Act case).

In dealing with the standing problem in the present case, the most compelling consideration is presented by the implications of Section 2(a) of the

Robinson-Patman Act, indicating the intention of Congress as to the ambit of the statute's protection. I refer to the language of Section 2(a), which prohibits price discrimination between purchasers,

> "...where the effect of such discrimination may be ... to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: ..."

Although the forbidden conduct under Section 2(a) is discrimination "between different purchasers," the language quoted above expressly recognizes that the competitive effects of such injury resulting from the discrimination may reach beyond the purchasers themselves. The statute, as quoted above, applies where competition is prevented (1) with a person who grants the discriminatory price, (2) a customer of the person who grants a discriminatory price, (3) a person who knowingly receives the benefit of a discriminatory price, or (4) a customer of a person who knowingly receives the benefit of a discriminatory price.

Considering this language in concrete terms, let us assume that a manufacturer (M) sells to two wholesalers (WA and WB). WA resells to a retailer (RA), and WB resells to a retailer (RB). M discriminates in price in favor of WA. This benefit is passed on to RA. RB is injured in its competition with RA.

Applying Section 2(a) to this situation, there would appear to be a violation of the statute, because M has discriminated in price between two purchasers, WA and WB, and because this discrimination has injured competition by RB with a customer (RA) of one who has received the benefit of the discrimination (WA).

It would seem to be perfectly clear that Congress intended in Section 2(a) to confer protection upon those parties who are injured in their competition with the types of beneficiaries of the discrimination described in the statute. There is no doubt that such protected parties have standing under Section 2(a) to sue the party guilty of the discrimination. In our example, this would mean that RB

would have the right to sue M, as well perhaps as WA and RA, if the latter parties had knowingly received benefit of the discrimination. This would be true even though RB is not a purchaser from M.

In Perkins v. Standard Oil Co. of California, 395 U.S. 642 (1969), plaintiff Perkins purchased gasoline and oil from Standard. Perkins was both a wholesaler, and a retailer through his own Perkins stations. Standard also sold to Signal, who resold to Signal's subsidiary Western Hyway, who in turn sold to Western's subsidiary, Regal. Standard's prices to Signal were lower than its prices to Perkins, and the benefit of the discrimination was passed on to Regal. Regal operated service stations which were able to undersell Perkins' service stations. The Supreme Court held that Perkins had a valid claim for this competitive injury. The Court noted (p. 647):

> "Here, Perkins' injuries resulted in part from impaired competition with a customer (Regal) of a customer (Western Hyway) of the favored purchaser (Signal)."

The Court went on to state (p. 648):

> "Here Standard discriminated in price between Perkins and Signal, and there was evidence from which the jury could conclude that Perkins was harmed competitively when Signal's price advantage was passed on to Perkins' retail competitor Regal. These facts are sufficient to give rise to recoverable damages under the Robinson-Patman Act.
>
> "Before an injured party can recover damages under the Act, he must, of course, be able to show a causal connection between the price discrimination in violation of the Act and the injury suffered. This is true regardless of the 'level' in the chain of distribution on which the injury occurs."

See also F.T.C. v. Sun Oil Co., 371 U.S. 505, 514 (1963).

The Perkins case does not, of course, expressly deal with the question of the standing of a non-purchaser to sue under Section 2(a) for competitive injury resulting from discrimination practiced upon a party farther up the line of distribution. The plaintiff in the Perkins case was a purchaser from Standard. However, the decision makes it clear that Section 2(a) is to be construed as covering competitive injuries at levels of distribution beyond the level of the purchasers from

the defendant. The basic test enunciated by the Court for recovery of damages by an injured party was that he must "be able to show a causal connection between the price discrimination in violation of the Act and the injury suffered" (Id. at 648).

In my view, the Perkins decision is entirely inconsistent with the view that parties having standing to sue under Section 2(a) are limited to purchasers from the defendant.

I now return to the line of cases commencing with Klein v. Lionel Corp., 237 F.2d 13 (3rd Cir. 1956), referred to earlier. The plaintiff in Klein was a retailer selling Lionel electric trains. Plaintiff purchased trains from wholesalers at suggested retail price less 40%. These wholesalers purchased from Lionel at suggested retail price less 52%. Lionel sold its trains directly, not only to wholesalers, but also to chain stores and mail order houses. Lionel charged the same price to the chain stores ard mail order houses as it did to the wholesalers. Plaintiff sued, claiming that he was in competition with the chain stores and the

mail order houses and that under Section 2(a), he should have been able to obtain his trains at the same prices as were charged to these chain stores and mail order houses. District Judge Rodney dismissed the complaint on a motion for summary judgment, on the ground that there had been no price discrimination by Lionel in its sales to its purchasers. Judge Rodney expressly left open the question of whether a retailer would have standing to sue for injury he sustained in the event there was discrimination practiced against his wholesaler. Klein v. Lionel Corp., 138 F. Supp. 560, 564 (D. Del.195

The Court of Appeals for the Third Circuit affirmed. However, the opinion of the court of appeals did not limit its discussion to the precise problem at hand, as Judge Rodney had carefully done. The Court of Appeals stated (237 F.2d at 14-15):

> "The decisions of many cases have crystallized the rule that an individual can have no cause of action under Section 2(a) of the Clayton Act unless he is an actual purchaser from the person charged with the discrimination. In Shaw's, Inc., v. Wilson-Jones Co., 3 Cir., 1939, 105 F.2d 331, 333, we stated: 'The discrimination in price referred to must be practiced "between different purchasers". Therefore at least two purchases must have taken place. The term purchasers means

> simply one who purchases, a buyer, a vendee.' Klein did purchase Lionel products, but not from Lionel. It follows that the necessary requisite of two purchasers from the same vendor is not met and Klein therefore can claim no protection under the Act as a direct purchaser." (footnote omitted)

I should note that the cases cited by the court of appeals in Klein in support of its dictum about standing do not in fact support the proposition. Moreover, in my view the dictum in Klein is contrary to the clear meaning of Section 2(a), and cannot be followed in view of the implications of the Supreme Court decision in Perkins v. Standard Oil Co. of California, 395 U.S. 642 (1969).

It is necessary at this point to examine the nature of the competitive injury suffered by FLM and to determine whether it is within the purview of Section 2(a). In the hypothetical example given above, the competitive injury occurred between RA and RB, who were both retailers. Both were on the same "functional level of distribution." It is fairly easy to conceive of

competitive injuries on the same functional level of distribution -- i.e., wholesalers vis-a-vis wholesalers, or retailers vis-a-vis retailers -- as coming within the purview of Section 2(a).

There is a distinction between such a situation and the present case which must be noted. Let us consider that in the present case M is Ford, WA is a Ford dealer selling directly to an independent repair shop, and RA is this independent repair shop. WB is a Ford dealer selling to FLM, who stands between that Ford dealer and the independent body shop (RB) who is the customer of FLM. FLM claims to be harmed because Ford has discriminated in price between WA and WB, charging a higher price to WB, who sells to FLM. But FLM is not complaining about being at a competitive disadvantage with another FLM-type middleman. Because of the relatively low markup it has been able to negotiate with WB, and because FLM has been able to offer superior services to certain independent repair shops, FLM has been able to compete with Ford dealers such as WA.

Is FLM on the same functional level of distribution as the party it is competing with -- WA? In one sense it is, in that FLM competes with WA for the business of the independent repair shops. But in another sense FLM is not on the same functional level with WA, because FLM is twice removed in the chain of sales from Ford. Moreover, FLM is not seeking to have its purchase price equalized with the purchase price of WA. It is only seeking to have the purchase price of WB equalized with that of WA.

The question is whether Section 2(a) protects, among other things, the type of competition engaged in by FLM, which is with parties not precisely on the same functional level of distribution. In F.T.C. v. Fred Meyer, Inc., 390 U.S. 341 (1968), a case under Section 2(d) involving promotional allowances, the Supreme Court held, on the facts of that case, that the competitive injury contemplated by Section 2(d) was that occurring on the same functional level of distribution. However, the Court noted that no such limitation is made in Section 2(a). The Court stated (pp. 356-57):

> "We noted in FTC v. Sun Oil Co., 371 U.S. 505 (1963), that when Congress wished to expand the meaning of competition to include more than resellers operating on the same functional level, it knew how to do so in unmistakable terms. It did so in § 2(a) of the Act by prohibiting price discrimination which may 'injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.'"

I hold that the type of competition engaged in by FLM with Ford dealers is within the protection of 2(a).[6]

I alluded earlier to the "target area" doctrine enunciated in such cases as Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc., 454 F.2d 1292 (2d Cir. 1971), cert. denied, 406 U.S. 930 (1972). The target area doctrine has been applied in a case which involved, in part, the Robinson-Patman Act. Billy Baxter, Inc. v. Coca-Cola Company, 431 F.2d 183 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971).

Applying the "target area" test to the present case, it would seem to be clear that FLM is within the target area of the alleged wrongful price discrimination

practiced by Ford. The purpose of Ford's change of policy regarding the wholesale incentive allowance was to withdraw this price benefit from Ford dealers who sold to middlemen such as FLM. It was the obvious desire of Ford to cut the middleman out of the channel of distribution, and have the Ford dealers sell directly to the independent body shops. As Ford has candidly admitted in its Trial Memorandum filed in this action, FLM "is neither needed nor desired" in the distribution of Ford crash parts (p. 35).

I conclude therefore that FLM has standing to sue Ford claiming (1) that Ford discriminates in the price of crash parts in favor of Ford dealers who sell directly to independent body shops and against any Ford dealer who sells to FLM, and (2) that FLM is harmed by this discrimination in its attempt to compete with Ford dealers for the business of the independent repair shops.

FLM has urged, as alternative grounds for its standing under Section 2(a), the application of the so-called "indirect purchaser" doctrine, or the somewhat related doctrine of F.T.C. v. Fred Meyer, Inc., 390 U.S. 341 (1968). I have concluded that neither of these theories is applicable to the present case.

The indirect purchaser doctrine has been developed to cover situations where a defendant has de facto control over the purchase price paid for goods by parties more than one step removed from the defendant in the line of distribution. The basic idea is that if such a defendant in some way controls the prices to such customers by means of suggested price lists or otherwise, they become "indirect purchasers" from the defendant within the meaning of § 2(a). American News Co. v. F.T.C., 300 F.2d 104 (2d Cir.), cert. denied, 371 U.S. 824 (1962); Purolator Products, Inc., 65 F.T.C. 8, 32 (1964), aff'd, 352 F.2d 874 (7th Cir. 1965), cert. denied, 389 U.S. 1045 (1968); Kraft-Phenix Cheese Corp., 25 F.T.C. 537 (1937). Cf. F.T.C. v. Fred Meyer, Inc., 390 U.S. 341 (1968).

FLM argues that Ford "controls" the prices charged by a Ford dealer selling to FLM, so that the indirect purchaser doctrine applies. It is true that a Ford dealer is not likely to charge FLM less than what Ford has charged to the dealer. However, this is not the type of "control" which brings into play the indirect purchaser doctrine. Otherwise the doctrine would apply to every resale of goods. The crucial point in the present case is that Ford has never sought to suggest or influence in any way the markup charged by a Ford dealer to FLM. This is strictly a matter of negotiation between the Ford dealer and FLM. There is no "suggested" price to FLM, as there is in the usual case involving the indirect purchaser doctrine. American News Co. v. F.T.C., supra; Purolator Products, Inc., supra; Champion Spark Plug Co., 50 F.T.C. 30, 44-45 (1953); Dentists Supply Co. of New York, 37 F.T.C. 345 (1943).

Moreover, it would be wholly inappropriate to apply the indirect purchaser doctrine in the present case, because FLM is not seeking, nor would there be

any grounds for the court to require, an equalization of prices paid by FLM vis-a-vis competing Ford dealers.

I also conclude that F.T.C. v. Fred Meyer, Inc., 390 U.S. 341 (1968), is not directly applicable to the present case. There the Supreme Court held that, in order to carry out the purposes of Section 2(d), a small retailer purchasing through a wholesaler should be considered to be a "customer" within the meaning of that section. The Court held that such a retailer was entitled to equal promotional allowances with a large direct-buying retailer. The Court emphasized that both retailers were on the same functional level of distribution.

The present case is distinguishable in an essential respect. The Fred Meyer doctrine was intended to equalize the position of the parties found by the Court to be customers. However, in the present case, as already noted in my discussion of the indirect purchaser doctrine, FLM is not seeking to obtain, nor could it properly be permitted to obtain, equalization of its prices with the prices paid by the Ford dealers.

(b) The Functional Discount Defense

Given the fact that I have limited FLM's Robinson-Patman Act case to a claim for discrimination between Ford dealers, Ford has asserted only one defense on the merits.[7] This defense is that Ford's price differentials to the dealers constitute permissible functional discounts.

Ford starts with the proposition that it is legal to charge a Ford dealer acting as a wholesaler less than a Ford dealer acting as a retailer. This is, of course, the basic price differentiation created by the wholesale incentive allowance for crash parts as it was originally promulgated in 1968.

Ford goes on to argue that, as the grantor of the wholesale incentive allowance, it has the legal right to define what the "wholesale function" is, and to define this function as referring only to direct sales by Ford dealers to independent repair shops, as distinct from indirect sales through an entity such as FLM. Ford's view is that when a dealer sells to FLM,

it is not performing the wholesale function itself, but is merely delegating that function to FLM. Ford contends that it can validly withhold the wholesale incentive allowance as to any dealer who thus fails to directly perform the wholesale function.

I have concluded that Ford's notion of the extent of its powers with respect to functional discounts is contrary to Section 2(a) of the Robinson-Patman Act. Ford undoubtedly has the right to charge a different (lower) price for a crash part to a Ford dealer when that dealer resells the part at wholesale, than Ford charges for the part when the dealer resells at retail. This is a standard functional discount, where a supplier charges different prices to purchasers at different functional levels of distribution, and where the higher price is charged to the purchaser at the level farther from the supplier in the chain of distribution -- i.e., the retailer is charged more than the wholesaler. This is a standard business practice and has been sanctioned by the legal authorities.

However, the situation is sharply different with respect to Ford's attempt to delineate the applicability of the wholesale incentive allowance in such a way as to deny the allowance when parts are sold to FLM, by charging a higher price to a dealer when it sells to FLM than Ford charges to a dealer when it sells directly to the independent repair shop. The pricing differential here is not between purchasers at different functional levels of distribution. Viewed realistically, the Ford dealer selling to FLM is on the same functional level as the Ford dealer selling to the independent repair shop. Both of these Ford dealers are in practical fact selling at the wholesale level, although one wholesales directly to independent repair shops and the other wholesales indirectly through FLM. At least it is clear beyond question that the Ford dealer which sells to FLM is not retailing the parts. But the prices which such a dealer must pay Ford for parts resold to FLM are the same prices as a dealer pays to Ford when he retails the parts.

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Basically Ford's policy respecting the wholesale incentive allowance amounts to discrimination in prices charged to purchasers at the same functional level of distribution (the wholesale level) with the purpose and effect of limiting or inhibiting the type of resale trade engaged in by these purchasers. This is not valid functional discounting.

Neither the Robinson-Patman Act nor the original Section 2 of the Clayton Act, 38 Stat. 730 (1914), makes any express reference to functional discounts. However, in a case arising under Clayton Act § 2, the Second Circuit approved in dictum the practice of charging different prices to wholesalers and retailers because of no adverse effect on competition. Mennan Co. v. F.T.C., 288 Fed. 774, 781 (2d Cir.), cert. denied, 262 U.S. 759 (1923).

When the 1936 amendments to Section 2 of the Clayton Act were being considered, provisions about functional discounts were proposed in both the Senate and the House. The proposal in the Senate was as follows:

> "Provided, That nothing herein contained shall prevent differentials in prices as between purchasers depending solely upon whether they purchase as factors, or wholesalers, or retailers, or consumers, or for use in further manufacture ...." 80 Cong. Rec. 6428 (1936).

The proposal in the House was:

> "That nothing herein contained shall prevent or require differentials as between purchasers depending solely upon whether they purchase for resale to wholesalers, to retailers, or to consumers, or for use in further manufacture; for the purpose of such classification of customers as wholesalers or jobbers, or retailers, the character of the selling of the purchaser and not the buying shall determine the classification, and any purchaser who, directly or indirectly, through a subsidiary or affiliated concern or broker, does both a wholesale and retail business shall, irrespective of quantity purchased, be classified (1) as a wholesaler on purchases for sale to retail dealers only, not owned or controlled, directly or indirectly, by the purchaser; and (2) as a retailer on purchases for sale to consumers." H.R. Rep. No. 2287, 74th Cong., 2d Sess. 1-2 (1936).

However, reference to functional discounts was entirely omitted from the Robinson-Patman Act as finally passed. This omission was apparently the result of farm opposition, based on the fear of disadvantages to farmers' cooperatives. 80 Cong. Rec. 8113, 8139 (1936).

The Congressional refusal to enact an express sanction for functional discounts has not been interpreted as indicating an intent to absolutely prohibit such discounts. It is assumed that Congress intended functional discounts to be judged under the general provisions of the statute in the same way as other pricing differentials, without any special treatment. Shniderman, "The Tyranny of Labels" -- A Study of Functional Discounts Under the Robinson-Patman Act, 60 Harv. L. Rev. 571 (1947); Kelley, Functional Discounts Under the Robinson-Patman Act, 40 Calif. L. Rev. 526 (1952); Rowe, Price Discrimination Under the Robinson-Patman Act, 173 (1962).

The basic test for the validity of a functional discount is whether there is an injury to competition. The Rowe text states (Ibid.):

> "The nature of the competition between the customers paying the higher and the lower prices is the key to the legality of 'functional discounts' or trade price differentials under the Robinson-Patman Act."

In general, it is accepted both from an economic and a legal standpoint, that a valid functional discount is one where the lower price is charged to the functional level nearer to the supplier, and the higher price is charged to the functional level farther from the supplier -- i.e., where distributors pay less than wholesalers, and wholesalers pay less than retailers. The Rowe text describes it as follows (Id. at 174):

> "In practice, the competitive effects requirement permits a supplier to quote different prices between different distributor classes -- so long as those who are higher up (nearer the supplier) on the distribution ladder pay less than those who are further down (nearer the consumer). Put another way, wholesalers or jobbers (or their equivalent) may receive greater discounts or lower prices than retailers or dealers -- so long as the wholesalers or jobbers sell only to retailers or dealers but not to consumers in competition with the retailers paying more."

This is basically the view taken by the Federal Trade Commission, as expressed in Doubleday and Co., Inc., 52 F.T.C. 169, 207-208 (1955), and General Foods Corp., 52 F.T.C. 798 (1956). In General Foods the Commission stated (Id. at 824):

> "While the Robinson-Patman Act does not mention functional pricing, it was written nevertheless against the background of the distribution system then in effect. As pointed out by respondent, a seller is not forbidden to sell at different prices to buyers in different functional classes and orders have been issued permitting lower prices to one functional class as against another, provided that injury to commerce as contemplated in the law does not result."

However, I hold that neither the statute nor the authorities interpreting it sanction the price differentials of Ford complained about by FLM. As described earlier, Ford is discriminating in price between Ford dealers who are operating at the same functional level of distribution. Ford does this for the specific purpose of inhibiting sales to middlemen such as FLM and for the purpose of discouraging such middlemen from competing in the distribution of crash parts.

Ford contends that it should not be compelled to make provision in its distribution system for what it regards as a superfluous intermediary such as FLM. Ford contends that it should not be required to give a wholesale incentive allowance to a Ford dealer who fails to

perform a "wholesale function" and merely delegates this responsibility to FLM. These contentions do not provide a valid defense to Ford.

FLM is not seeking to have Ford set up any special or unique discount -- such as a distributor's discount -- for Ford dealers who sell to FLM. FLM is not seeking to have any "suggested" price for sales by Ford dealers to FLM, which would establish FLM as a part of Ford's regular, contemplated distribution system. What FLM is seeking is simply to have Ford charge the same wholesale price to its dealers whether they sell to FLM or directly to an independent body shop. FLM is seeking the opportunity to purchase crash parts from Ford dealers, and to freely participate in competition for the distribution of these parts, without the positive hindrance presented by Ford's price discrimination.

I also reject the contention of Ford that Ford can charge a higher price for crash parts to a Ford dealer because Ford views that dealer as not performing the "wholesale function" when it is selling to FLM. A Ford dealer buying parts for wholesale should be basically free to choose its

own channels of distribution -- i.e., be free to decide whether it will sell directly to an independent repair shop or sell to a middleman such as FLM who in turn sells to the independent repair shop. Moreover, a company such as FLM should be free to purchase from the Ford dealer and to compete, through offering superior service, for the business of the independent repair shops.

The case of United States v. General Motors Corp., 384 U.S. 127 (1966), is instructive in this regard. Although this case was brought under Section 1 of the Sherman Act, it illustrates the type of competitive interests which are involved in the present case. ThereGeneral Motors had combined with franchised Chevrolet dealers in Los Angeles to prevent discount houses from purchasing cars from certain franchised dealers. The discount houses were competing with the dealers in the retail sales of Chevrolet cars. The Supreme Court held that this was an illegal restraint of trade in that it was calculated "to deprive franchised dealers of their freedom to deal through discounters if they so choose" (Id. at 140). The Court further

described the fact that there was action by the defendants "to eliminate the discounters from participation in the market, to inhibit the free choice of franchised dealers to select their own methods of trade ..." (Id. at 144).

These passages describe the basic vice of Ford's actions in the present case. Ford's revised wholesale incentive policy was designed to discourage franchised Ford dealers in their freedom to deal through middlemen such as FLM if they so choose. Moreover, Ford's revised policy necessarily has the ultimate effect of eliminating, or sharply curtailing, middlemen such as FLM from participation in the market.

I referred earlier to Ford's evidence that two of its considerations giving rise to the amendment in its wholesale incentive allowance rules were the concern that a middleman such as FLM might operate as a conduit between Ford dealers, and the concern that a Ford dealer selling to such a middleman would seek a special distributor's allowance. The fact is, as I have found, that nothing in connection with the activities

of FLM, or the Ford dealers' sales to FLM, provided the slightest basis for either of these concerns. Ford does not really argue to the contrary. Ford's contention is that these were concerns respecting other parties and other areas of Ford's spare parts business, giving rise to the need for general rules and regulations, which perchance apply to FLM.

This situation constitutes no valid justification, under the statute or the applicable authorities, for the anti-competitive price discrimination which Ford has instituted. This is particularly true in view of the fact that there is no evidence of any real attempt by Ford to solve its alleged problems by means that do not involve price discrimination.

For these reasons, I hold that Ford's discrimination in the price of crash parts between Ford dealers who wholesale directly to independent repair shops and Ford dealers who sell to middlemen such as FLM is a violation of Section 2(a) of the Robinson-Patman Act and does not constitute valid functional discounting.

Sherman Act

I hold that FLM has not made out a valid case under either Section 1 or Section 2 of the Sherman Act.

For its Section 1 claim, FLM relies on cases such as United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967) and United States v. Parke, Davis & Co., 362 U.S. 29 (1960), involving agreements between a supplier and its dealers or distributors fixing resale prices and allocating territories. The short answer to this argument is that no such agreement has been shown by the evidence in this case.

The illegal activity of Ford is in the setting of discriminatory prices it charges to dealers selling to FLM. The sole activity of the dealers vis-a-vis Ford is to pay the prices charged by Ford. FLM has not proved the existence of any agreement between Ford and any dealers that the dealers would not sell to FLM. Indeed certain Ford dealers are still selling to FLM. There is no evidence that any Ford dealers have entered into an agreement with Ford as to what prices the dealers will charge to FLM. The dealers pay Ford the prices charged by Ford, and then sell to FLM at a markup above these

prices -- the markup being negotiated with FLM. This is by no means a resale price agreement within the meaning of the authorities.

In support of its Section 1 claim FLM urges that there was a combination or conspiracy between defendant Ford Motor Company and defendant Ford Marketing Corporation. There is no evidence to support this contention. Ford Marketing Corporation did not come into existence until 1970. It assumed the marketing responsibility for Ford automobiles and parts commencing in July 1970. Ford Marketing Corporation was, of course, in existence during 1971 and 1972 when the events complained of in this action occurred. The essential point is that the relevant actions with respect to the wholesale incentive discount were undertaken, as far as the evidence shows, solely by personnel in the marketing arm of Ford, whether this arm was a division within Ford Motor Company or was a separate corporation, Ford Marketing Corporation. There is no evidence of any combination or conspiracy between the two corporations.

For its Sherman Act § 2 claim, FLM relies upon cases such as Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927), and Poster Exchange, Inc. v. National Screen Service Corp., 431 F.2d 334 (5th Cir. 1970), holding that Section 2 prohibits the use of monopoly power on one level of distribution to destroy competition on another level. See also Otter Tail Power Co. v. United States, 410 U.S. 366 (1973); United States v. Aluminum Co. of America, 148 F.2d 416, 437-39 (2d Cir. 1945).

However, these cases involved vertical integrations between the two levels. In Kodak, the defendant manufactured film products and owned the retail stores that sold these products in competition with plaintiff. In Otter Tail the defendant generated power, and distributed it through its own retail distribution system, which sold power in competition with municipally owned retail distribution systems.

In the present case Ford distributes automobiles and crash parts, but it does not own the franchised dealers who wholesale these parts in competition with FLM. The exception to this is the so-called dealer

development franchise, where Ford has a temporary ownership interest in the dealer for financing purposes. However, the evidence in this case about dealer development franchises is fragmentary and is hardly sufficient to permit a finding of vertical integration between Ford and its dealers.

On the basis of the record in the present case as a whole, I decline to extend the rule of the Eastman Kodak Co. case and the other cases referred to above to cover the situation of Ford and its franchised dealers.

Ford's Refusal to Sell Directly to FLM

FLM has advanced the contention (although not forcefully) that Ford has violated the antitrust laws in refusing to sell crash parts directly to FLM rather than selling exclusively to franchised Ford dealers. I reject this contention for reasons which I will set forth briefly.

Section 2(a) of the Robinson-Patman Act expressly provides:

> "... That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade; ..."

Based on well-established law, Ford had the right to distribute automobiles and crash parts manufactured by it solely to franchised dealers. United States v. Colgate & Co., 250 U.S. 300 (1919); Atalanta Trading Corp. v. F.T.C., 258 F.2d 365, 372-73 (2d Cir. 1958); Naifeh v. Ronson Art Works, 218 F.2d 202 (10th Cir. 1954); Chicago Seating Co. v. S. Karpen & Bros., 177 F.2d 863 (7th Cir. 1949).

I have already held that it is illegal for Ford, by means of price discrimination, to inhibit a dealer from selling to a middleman such as FLM, and to inhibit FLM from freely purchasing crash parts from a Ford dealer in order to compete in the distribution process. With this price discrimination removed, Ford is free to restrict its sales to its dealers. There is ample evidence of valid economic and administrative justification for such restriction.

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Conclusion

FLM is entitled to injunctive relief and damages on its claim of price discrimination under Section 2(a) of the Robinson-Patman Act. FLM is entitled to no relief or recovery under its other antitrust claims. Following the completion of the record as to the amount of damages, there will be a supplemental opinion on that subject.

Dated: New York, New York
December 19, 1975

Original Signed
Thomas P. Griesa

THOMAS P. GRIESA
U.S.D.J.

FOOTNOTES

1. Ford Marketing Corporation was incorporated in 1970, and commencing in July 1970 was responsible for the marketing of Ford, Mercury and Lincoln automobiles and related products. Prior to July 1970 this marketing function had been performed by the manufacturer, Ford Motor Company. It appears that subsequent to the trial of this action Ford Marketing Corporation was dissolved, and the marketing function was returned to Ford Motor Company. For the purposes of this case, defendants Ford Motor Company and Ford Marketing Corporation will usually be treated as a single entity, and will be referred to as "Ford".

2. For purposes of simplicity, in this opinion I will refer to franchised Ford, Mercury and Lincoln dealers as "Ford dealers".

3. It appears that prior to 1968 the amount of the allowance used in calculating the dealer price was 42%, and that commencing in 1968 the amount of this allowance was 40%.

   There were certain other discounts or allowances granted, under certain circumstances, to dealers in connection with the purchase of crash parts. FLM makes claims for damages based on certain allegations of inability to obtain these allowances. These claims will be discussed in the supplemental opinion regarding damages.

FOOTNOTES (cont.)

4. This is a restated figure, deducting from the cost of parts the amount of $21,897.00 wholesale incentive allowance settled in fiscal 1973 and applicable to 1972.

5. FLM contends, not only that Ford withdrew the wholesale incentive allowance, but that Ford directed Atlas to completely cease doing business with FLM. I reject FLM's contention on the latter point. The Ford witnesses deny that any such direction was given, and I credit this denial.

6. Section 2(a) has been held to apply to competitive injury occurring where the competitors are on different functional levels of distribution. Purolator Products, Inc., 65 F.T.C. 8 (1964), aff'd, 352 F.2d 874 (7th Cir. 1965), cert. denied, 389 U.S. 1045 (1968). There the Commission found a competitive injury covered by Section 2(a), where jobbers competed with wholesale dealers from whom the jobbers purchased goods. The facts in Purolator were substantially different from the facts presented in the present case, and resort was had in Purolator to the "indirect purchaser" doctrine, which, for reasons described hereafter, I hold inapplicable to the present case. However, Purolator does illustrate the point that Section 2(a) can be applied, in an appropriate case, to a competitive injury where the competitors are not on the same functional level.

In United States v. General Motors Corp., 384 U.S. 127 (1966), to be described more fully later in this opinion, the Supreme Court found a Sherman Act violation where General Motors combined with certain of its Chevrolet dealers to prevent other Chevrolet dealers from selling to discount houses, thereby preventing the discount houses from competing with dealers.

FOOTNOTES (Cont.)

7. Proof of a price differential is prima facie proof of injury to competition within the meaning of Section 2(a). Samuel H. Moss, Inc., v. F.T.C., 148 F.2d 378 (2d Cir.), cert. denied, 326 U.S. 734 (1945). It is further held that an injury to a competitor is sufficient proof of injury to competition. F.T.C. v. Morton Salt Co., 334 U.S. 37, 49 (1948).

Plaintiff's Petition For Attorneys' Fees and Costs,
January 23, 1976

Warren Ex. 1

Rec'd 1/30/74
5:20 P.M.

1643a

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

----------x

73 Civ. 713 (TPG)

Petition of Plaintiff FLM Collision Parts, Inc. for the Award of a Reasonable Attorneys Fee and the Costs of this Suit Pursuant to 15 U.S.C. 15

Plaintiff FLM Collision Parts, Inc. ("FLM") respectfully petitions this Court to determine and award to it a reasonable attorneys fee and the costs of this suit which it is entitled to recover as a successful plaintiff in an antitrust action, as provided in Section 4 of the Clayton Act, 15 U.S.C. 15.

This petition seeks an award of attorneys fees in connection with the services rendered by plaintiff's counsel over a three-year period in this action. A detailed description of those services is set forth in the annexed affi[illegible]

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In November 1972 the plaintiff retained David L. Wasser with respect to commencing an action against the defendants Ford Motor Company and Ford Marketing Corporation ("Ford").

Ford is the sole manufacturer and distributor of crash parts for Ford automobiles. Ford sells its crash parts directly only to franchised Ford dealers who in turn resell some of these parts to independent service and repair stations. The plaintiff had an arrangement with various franchised Ford dealers whereby it would purchase a large volume of crash parts at a small mark-up and resell these parts to independent service stations.

In or about November 1972 the defendants began to enforce a policy preventing its dealers from selling crash parts to the plaintiff and not granting franchised dealers the wholesale incentive allowance discount on those parts which they sold to the plaintiff. Such a discount was granted to franchised dealers if they resold the very same parts directly to service stations.

The effect of withholding this discount which averages approximately 20 percent on those parts carrying the allowance had a devastating effect upon the plaintiff's business. The plaintiff retained David L. Wasser to commence this action against the defendants on the grounds that their actions violated the antitrust laws of the United States in that they constituted a combination and conspiracy in restraint of trade, an attempt to monopolize the after market in Ford crash parts and constituted a discriminatory pricing scheme which prevented it from competing in the sale of crash parts.

After extensive research into the legal problems involved, including meetings with the Federal Trade Commission which did not take any action against the defendants, the plaintiff on February 15, 1973 filed the complaint in this action. As set forth in the annexed affidavits of David L. Wasser and Stuart A. Schlesinger, thereafter plaintiff's counsel spent a great deal of time, effort and money in prosecuting this action.

In view of the time, money and effort expended in prosecuting this action and the success which has been achieved as a result thereof, the plaintiff believes that it is entitled to recover a reasonable attorneys fee in the amount of $425,000.

The factors which the Courts have considered in awarding attorneys fees in antitrust cases were recently reiterated by the Second Circuit in City of Detroit v. Grinnell Corp., 495 F.2d 448, 470 (2d. Cir. 1974). These are:

> "(1) whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the Government,
> (2) the standing of counsel at the bar--both counsel receiving the award and opposing counsel,
> (3) time and labor spent,
> (4) magnitude and complexity of the litigation,
> (5) responsibility undertaken,
> (6) the amount recovered,
> (7) the knowledge the court has of conferences, arguments that were presented and of work shown by the record to have been done by attorneys for the plaintiff prior to trial,
> (8) what it would be reasonable for counsel to charge a victorious plaintiff."

In addition, another criterion which should be taken into account is the attorneys' risk in litigation, that is, whether or not the fee is a fixed one or the attorneys' fee is contingent upon his success.

Based upon the foregoing criteria, it is respectfully submitted that the plaintiff's request for counsel fees in the amount of $425,000 is extremely reasonable and should be awarded by the Court. In considering the applicable criteria, we find that:

(1) Plaintiff's counsel did not have the benefit of any prior judgment or decree in a case brought by the government. In fact, although plaintiff's counsel called the government's attention to the defendants' practices, and although the government, and in particular, the Federal Trade Commission, were aware of the defendants' practices, the government did not bring an action, but rather left it to the plaintiff, whose very liquidity had been threatened by the defendants' violation of the antitrust laws, to privately bring an action against defendants with the power and resources of the Ford Motor Company.

(2) The standing at the bar of counsel who appeared during this case is well-known to the Court and are set forth in the annexed affidavits of David L. Wasser and Stuart A. Schlesinger. Not only was plaintiff's counsel and trial counsel of the highest caliber, but the defendants in this case were represented by the firm of Sullivan & Cromwell, one of the nation's leading law firms with unlimited manpower and resources and who fees were assured regardless of whether they were successful at the trial of this action.

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(3) Plaintiff's counsel have labored over this action for over three years and have expended 2,104 hours of partners and associates attorneys' time in the prosecution of this action in addition to 157 hours of paralegal time and 365 hours were expended by plaintiff's counsel David L. Wasser, who is also a certified public account in performing accounting services for the plaintiff in computing the damages suffered by the plaintiff in this action.

(4) The magnitude and complexity of the litigation involved in this action are well-known to the Court and readily apparent from the fact that the Court itself was required to write a 69-page opinion on the issues involving the law alone. Of particular complexity were those issues involving the construction of Section 2(a) of the Robinson-Patman Act since the plaintiff in this case was not a direct purchaser from the defendants.

(5) The responsibility undertaken by plaintiff's counsel in this matter was an extremely onerous one. As has been set forth in the affidavits of David L. Wasser and Stuart A. Schlesinger, counsel representing the plaintiff did not receive any fee at all for its labors and compensation was based upon a contingency agreement. If the plaintiff was unsuccessfull, then all of the time, labor and money expended by plaintiff's counsel would be unrewarded in any way whatsoever. Unlike the defendants in this action, who had available to them unlimited resources of time, manpower and money, plaintiff's counsel was compelled to prosecute this action on a very limited budget and limited manpower, requiring long hours to be expended by plaintiff's counsel to compensate for this deficiency.

(6) Since a damage award has not yet been made in this action plaintiff's counsel in this petition cannot set forth with any precision the amount which it has successfully recovered in this action. However, even if the plaintiff's damages are limited to those two areas which the Court indicated would be the only ones it would allow the plaintiff to recover, i.e.

(a) the overpayment by the plaintiff to the defendant of the wholesale incentive allowance; and

(b) the plaintiff's lost profits for the years in question,

the plaintiff's damages for those two items alone should be approximately $300,000 single damages and $900,000 trebled. In addition, and perhaps most important is the fact that the Court in its decision of December 19, 1975 stated that it would issue a permanent injunction enjoining the defendants from any further price discrimination against the plaintiff in the future and directing that they grant their franchise dealers the wholesale incentive allowance for sales made to the plaintiff. Over the years to come, the value of the plaintiff being able to receive such a wholesale incentive allowance will immeasurably aid the plaintiff's business.

(7) The Court is aware of the great amount of work which plaintiff's counsel of record and trial counsel did in this action. After a seven-day trial of this action before the Court, due to the complex legal issues involved particularly those involving the standing of the plaintiff to sue under Section 2(a) of the Robinson Patman Act, since the plaintiff was not a direct purchaser

from the defendants, the Court on January 16, 1975 held a conference with all counsel and requested that additional briefs be submitted.

In response to the Court's request, plaintiff's counsel literally read every decision decided under the applicable provisions of the Robinson-Patman Act and most of the existing literature in the form of treatises and law review articles involving the Robinson-Patman Act. The plaintiff's brief involving the Robinson-Patman Act constituted a comprehensive examination of the purpose and meaning of the Act and, it appears to plaintiff's counsel that the Court in its decision of December 19, 1975, in finding for the plaintiff under the Robinson-Patman Act, relied at least in part on the analysis contained in the plaintiff's post-trial brief.

After this Court found in favor of the plaintiff and that the defendants had violated Section 2(a) of the Robinson-Patman Act, the Court set down February 6, 1976 as a date for a further hearing on damages. Between December 19, 1975 to date, plaintiff's counsel has expended a large amount of time in computing those items of damage which the Court indicated that it would permit and will be required to expend additional time in the future during the damage hearing.

(8) Due to the complexity of the legal matters involved in this action, it would be reasonable for plaintiff's counsel to charge a victorious plaintiff $425,000 as a fee, even though that fee was agreed upon and not contingent since the benefit to the plaintiff of this Court's directing the defendants to now permit the plaintiff to receive the wholesale incentive allowance will be many times that amount in the years to come.

In addition, in a case of this nature, where plaintiff's counsel is laboring without the expectation of any compensation at all unless they are successful, that factor too should be taken into account when the Court considers what it would be reasonable for plaintiff's counsel to charge a victorious plaintiff.

In addition to all of the foregoing factors, the fact that plaintiff's counsel prosecuted this action on the basis of a contingency fee is of great importance and should be taken into account by the Court in awarding plaintiff's counsel a reasonable attorneys' fee. Plaintiff's counsel would receive no fee at all if they were not successful and, accordingly, are entitled to be compensated for the "risk factor" in this litigation.

The Code of Professional Responsibility includes as one of the guides in determining the reasonableness of a fee whether the fee is fixed or contingent (DR 2-106). Judge Wyzanski in Cherner v. Transitron Electronic Corp., 221 F. Supp. 55, 61 (D. Mass. 1963) stated:

> "No one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success. Nor, particularly in complicated cases producing large recoveries, is it just to make a fee depend solely on the reasonable amount of time expended."

See, also, City of Detroit v. Grinnell, supra, 495 F.2d at 470. In addition, the general overhead of plaintiff's counsel with respect to this case during the approximately three years it has been pending should be taken into account.

As the Court stated In re Middle West Utilities Co., 17 F.Supp. 359, 375 (N.D. Ill. 1936):

> "General office expenses incurred in preparation for court proceedings and work on the plan should not be allowed as expenses, but should be taken into consideration in making allowances for services. In determining allowances for services, the court must have in mind that attorneys, unlike public officers, do not receive the full amount of the allowances. They must maintain their offices, pay the salaries of junior attorneys and clerks, keep up their library and defray the incidental expense necessary to the practice of their profession. These expenses usually take from one-third to one-half of the gross receipts, and allowances for services should be made accordingly."

As noted recently by Judge Gurfein in Rosenfeld v. Black, CCH Fed. Sec.L.Rep. par. 93,635 (S.D.N.Y. 1972):

> " . . . in these days of high costs, the lawyer's overhead is no small factor especially in a contingent fee situation." (at p. 92,876)

The contingency factor is perhaps more subject to quantification than the quality factor. If 50 percent of the contingent securities cases are successful enough to warrant a full fee, the awards in those cases must be twice what would be the normal fee for comparable noncontingent work to give counsel normal compensation on the average. It is easy to say that the unsuccessful defendant should not have to pay counsel for counsel's services to some other plaintiff in an unrelated unsuccessful case, but such a contention ignores the fact that able counsel would simply decline to take on cases which [illegible] a substantial contingency element if the best compensation they could hope for, on the average, would be half of what they would receive for other kinds of work. In an area where "private attorneys general" are

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encouraged to step forward to vindicate public interests, see, e.g., Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972); Fortner Enterprises Inc. v. United States Steel Corp., 394 U.S. 495, 502 (1969), it is necessary to recognize the broader "institutional" need for encouraging a segment of the bar to undertake the heavy labors and financial risks involved in such cases. See, e.g., Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., 481 F.2d 1045, 1050 (2d. Cir. 1973), cert. denied, 414 U.S. 1092 (1973); Halverson v. Convenience Food Mart, Inc., 458 F.2d 927, 931 n.5 (7th Cir. 1972); Katz v. Carte Blanche Corp., 496 F.2d 747, 761 (3d. Cir.), cert. denied, 95 S.Ct. 152 (1974); Freeman v. Ludwig, 484 F.2d 1262, 1267 (2d. Cir. 1973), cert. denied, 416 U.S. 905 (1974). As Judge Weinstein observed in Dolgow v. Anderson, 43 F.R.D. 472, 494 (E.D.N.Y. 1968):

> "In some areas of the law, society is dependent upon 'the initiative of lawyers for the assertion of rights' . . . and the maintenance of desired standards of conduct. The purpose of handsome compensation is held out as an inducement to encourage lawyers to bring such suits."

The federal antitrust laws are the type of public interest statutes whose enforcement is to be encouraged in order to carry out the Congressional purpose of encouraging competition.

Another factor which is to be taken into account when awarding an attorneys fee in a case of this nature is the relationship the attorneys' fee bears to the amount recovered.

In this case the amount of damages sustained by the plaintiff which the Court indicated it would permit the plaintiff to recover will be approximately $300,000 in single damages and $900,000 trebled. In addition to the direct monetary recovery and perhaps even more important will be the fact that this Court has held in its decision of December 19, 1975 that the plaintiff is entitled to a permanent injunction enjoining the defendants from discriminating in price against the plaintiff in the future and providing that the plaintiff will receive whatever benefits are available under the wholesale incentive discount. The value of this injunction to the plaintiff should far exceed the monetary recovery to date. The cases have clearly held that attorneys fees may be awarded and based upon the benefits conferred upon a plaintiff even if that benefit is non-pecuniary in nature. See Merola v. Atlantic Richfield Company, 515 F.2d 165 (3d. Cir. 1975).

Under these circumstances if the Court were to consider what it would be reasonable for counsel to charge a victorious plaintiff, it is evident that $425,000 is not excessive and, in fact, is a conservative amount to award plaintiff's counsel. Using the hourly approach, the value of the time expended by plaintiff's counsel is:

	No. of Hours	Hourly Rate	Total
David L. Wasser	1,277	$100	$127,700
Julien A. Schlesinger, P.C.	827		$ 96,430
Alan [illegible]. Julien	(197)	$200	($ 39,400)
Stuart A. Schlesinger	(268)	$125	($ 33,500)
David Jaroslawicz	(362)	$ 65	($ 23,530)
TOTAL	2,104		$224,130.00

for a total of $224,130.00. This is without taking into account 365 hours expended by David L. Wasser as an accountant in computing the plaintiff's damages in this action for which he would normally charge a fee of $36,500, and the time expended by paralegals and other certified public accountants employed to compute the plaintiff's damages.

Taking into account simply the time expended by David L. Wasser as plaintiff's counsel, and not his accounting services, and the time expended by Julien & Schlesinger, P.C. as trial counsel, the normal billing to the plaintiff at an hourly rate would be $224,130.00. This is without adding any bonus which plaintiff's counsel is clearly entitled to for accepting this action on a contingency basis and all the risks attendant thereto. See City of Detroit v. Grinnell Corp., supra; Lindy Bros. Builders Inc. v. American Radiator and Standard Sanitary Corp., 487 F.2d 161 (3d. Cir. 1973); Levin v. Miss. River Corp., 377 F.Supp. 926 (S.D.N.Y. 1974); Blank v. Talley, 390 F.Supp. 1 (S.D.N.Y. 1975); and Donson Stores, Inc. v. American Bakeries Co., CCH Trade Cases (1973-2), par. 74,691 (S.D.N.Y. 1973). See, also, generally, "Attorneys Fees in Individual and Class Actions on Antitrust Litigation", 60 Cal.L. Rev. 1656 (1972).

The above request for counsel fees by plaintiff's counsel does not include the full time expended by plaintiff's counsel in preparing the fee application, although one of the leading cases dealing with counsel fees and antitrust actions clearly provides that successful plaintiff's counsel in antitrust actions is entitled to recover for the time and effort they expended in preparing their fee application. See Perkins v. Standard Oil Co. of California, 474 F.2d 549 (9th Cir. 1973), cert. denied, 93 S. Ct. 726 (1973). In Perkins, the Court permitted the plaintiffs to recover $14,[illegible] time expended by counsel in preparing a fee application.

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A review of the counsel fees which have been awarded in the past by courts to successful plaintiff's counsel in antitrust cases will show that the amount requested by plaintiff's counsel is well within those guidelines. In Bray v. Safeway Stores, Inc., 392 F.Supp. 851 (N.D. Cal. 1975), counsel expended 7,500 hours, received a single damage award of $10,904,027 and a counsel fee of $3,200,000. In Aloha Airlines, Inc. v. Hawaiian Airlines, 68 F.R.D. 351 (D.Hawaii 1975), the plaintiffs recovered $1.5 million in single damages and a $500,000 attorneys fee. In Cook v. Ralston Purina Co., 366 F.Supp. 999 (D.Ga. 1973), counsel expended approximately 1,000 hours, recovered $80,000 in single damages and was awarded a counsel fee of $75,000. In Twentieth Century Fox Film Corp. v. Goldwin, 328 F.2d 190 (9th Cir. 1969), the plaintiff was awarded $100,000 in single damages and $100,000 in attorneys fees.

The plaintiff's request for a $425,000 attorneys fee is in accord with all of the guidelines set forth above and under all of the circumstances would constitute a reasonable attorneys fee in this matter.

In addition to a reasonable attorneys fee, the plaintiff is also entitled to recover its costs pursuant to 15 U.S.C. 15. The plaintiff has had the following costs in this case for which it is entitled to be reimbursed. The value of time and monies expended for accountants and auditors to prepare plaintiff's damages in this action are:

David L. Wasser	- 365 hours @ $100 per hour	= $36,500
Other C.P.A.'s (Morris Israel Jack Brand)	- 138 hours @ $ 75 per hour	= $10,350

The plaintiff is entitled to recover the value and/or costs of such auditing services. See Fey v. Walston & Co., Inc., 493 F.2d 1036, 1055 (7th Cir. 1974); and Brookside Theatre Corp. v. Twentieth Century - F.F.C., 11 F.R.D. 259, 267 (W.D. Mo. 1951).

In addition, the plaintiff has also incurred the following expenses for which it is entitled to be reimbursed:

S.D.N.Y. Filing Fee	$15.00
Marshal's Fees	$19.00
S.D. Court Reporters Transcript	$569.00
Adlers Reporting Service for Deposition of Morris J. Rolands	$424.45
Adlers Reporting Service for Deposition of James R. Rose	$193.45
Trial Subpoenas	$80.00
TOTAL	$1,300.90

Based upon the foregoing, the plaintiff respectfully requests that it be awarded an attorneys' fee in the amount of $425,000, auditing

expenses in the amount of $46,850.00 and costs in the amount of $1,300.90.

Dated: New York, New York
January 23, 1976

JULIEN & SCHLESINGER, P.C.

By _____
A Member of the Firm
Trial Counsel for Plaintiff
2 Lafayette Street
New York, New York 10007
(212) 962-8020

Wasser Ex 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

77 Civ. 713 (TPG)

AFFIDAVIT IN SUPPORT OF PLAINTIFF'S APPLICATION FOR REASONABLE ATTORNEY'S FEE

----------x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

DAVID L. WASSER, being duly sworn, deposes and says:

He is an attorney-at-law and a member of the bar of this Court and a certified public accountant. He maintains offices for the practice of law and accounting at 250 West 57th Street, New York, N.Y. 10019.

He is submitting this affidavit in support of the application being made by plaintiff's counsel in this action for a reasonable attorney's fee pursuant to 15 U.S.C. 15.

For many years your deponent has acted as both counsel and as the certified public accountant for the plaintiff in this action, FLM COLLISION PARTS, INC. (FLM). FLM was and is in the business of purchasing crash parts from franchised Ford dealers for Ford-made automobiles and selling those parts to independent service stations.

In 1968 Ford established a wholesale incentive allowance which gave franchised Ford dealers an additional discount of approximately 20% to 25% for those crash parts which the franchised dealer sold to independent repair shops rather than use in its own business. FLM had an agreement with several franchised Ford dealers whereby all discounts received from Ford, except for a small mark-up varying between 2% and 5%, were passed along to FLM.

Commencing in November 1972, Ford advised its dealers that it would no longer permit them to receive such an incentive for parts which they resold to the plaintiff rather than directly to an independent repair shop. Needless to say, the sudden withdrawal of a discount of 20% to 25% on a large percentage of the parts which were sold by FLM had a severe effect on its business which up to this point had been highly profitable.

After the withdrawal of the discount, FLM's business began to suffer from a loss of profitability, and it was unable to compete with franchised Ford dealers in the sale of crash parts.

Your deponent, acting as FLM's counsel, felt that Ford's action in withdrawing this discount from FLM was in violation of the antitrust laws of the United States; in particular, Section 1 of the Sherman Act, since the defendants had involved third persons, i.e., the franchised Ford dealers in a combination

to prevent the plaintiff from receiving this wholesale incentive discount; Section 2 of the Sherman Act, since Ford had shown that it had intended to monopolize the after-market, and Section 2(a) of the Robinson-Patman Act, since Ford's pricing policy was obviously discriminatory as against the plaintiff.

After numerous discussions with Ford and its counsel, both in New York and in Detroit, Michigan and with representatives of the Federal Trade Commission, Bureau of Unfair Competition, which took place in New York and in Washington, D.C., your deponent and the plaintiff saw no other course open to them but to commence an action in the United States District Court to seek relief from the defendants' violations of the antitrust laws.

After much effort and research, particularly involving Section 2(a) of the Robinson-Patman Act, since the plaintiff was not a direct purchaser from the defendants, your deponent, as counsel for the plaintiff, filed a complaint in this Court on February 15, 1973, alleging violation of Sections 1 and 2 of the Sherman Act and Section 2(a) of the Robinson-Patman Act.

The defendants retained the firm of Sullivan & Cromwell, one of the nation's leading law firms, to defend this action brought by the plaintiff. Your deponent is a single practitioner and the Court is well aware of the difficulty he encountered in attempting to single-handedly oppose a firm having the manpower and resources of Sullivan & Cromwell, and the economic muscle and unlimited resources of the Ford Motor Company behind it.

Immediately after the complaint was filed in this action on February 15, 1973, there has been a continuous and steady flurry of activity involving a substantial portion of your deponent's time in the prosecution of this action. It should be pointed out that since your deponent is a single practitioner, by devoting a substantial portion of his time to the prosecution of this action, he has been unable to involve himself in other legal and accounting matters which would produce revenue for him. To date with the damage hearing as to the amount of damages sustained by the plaintiff still outstanding, your deponent has already expended 1,277 hours in performing legal work in this action and 365 hours in performing accounting work on behalf of the plaintiff in computing the plaintiff's damages which were presented at the trial of this action and which will be further presented at the damage hearing currently scheduled for February 6, 1976. In addition, your deponent has engaged paralegals, who have expended 157 hours on the legal work in this action, and has engaged other accountants who have expended 138 hours in doing the necessary accounting work in this action regarding the plaintiff's damages.

In addition, the Court should be aware that unlike defendants' counsel, who had a highly solvent large corporation footing its legal bills and was assured that payment would be forthcoming, your deponent undertook to represent the plaintiff on a contingency basis so that if there was no recovery and the plaintiff was not successful in the prosecution of this action, all of your deponent's labors and efforts would be uncompensated.

Since the withdrawal of this wholesale incentive discount was causing injury to the plaintiff's business on a daily basis for each day that Ford was permitted to direct its franchised dealers to withhold this discount from the plaintiff, on May 21, 1973 the plaintiff moved for a preliminary injunction in this Court to enjoin the defendants from withholding the wholesale incentive discount while the action wound its way to trial.

After numerous memoranda and affidavits were submitted in support of and in opposition to plaintiff's motion for a preliminary injunction, on March 25, 1974 after a conference with the Court, plaintiff withdrew its motion for a preliminary injunction with the understanding that the action would be brought on for a speedy trial which was soon scheduled for September 24, 1974.

In light of the fact that this action would be proceeding toward a speedy trial scheduled for September 24, 1974, and the complex issues which were involved in this case, your deponent retained ALFRED S. JULIEN and the firm of JULIEN & SCHLESINGER, P.C. as trial counsel. Mr. Julien's firm was retained in July of 1974 and immediately began preparing required pretrial memoranda of law, examined all of the documents in this action together with your deponent, took the depositions of James R. Rose and M. J. Rowlands, key employees of Ford with regard to this litigation, and generally did everything that was necessary in conjunction with your deponent to prepare for a trial of this action.

A trial before the Court of this action was commenced September 23, 1974 and continued for seven days, terminating on October 9, 1974. In preparing for trial and during the trial itself, your deponent together with Mr. Julien's firm devoted his full time to the trial of this action, with your deponent having the primary responsibility for calculating damages suffered by the plaintiff as a result of the defendants' violations of the antitrust laws.

It should be pointed out to the Court that it was a time-consuming and difficult job in this action to calculate the various means by which the plaintiff had been damaged. In particular, it required a great amount of time to review each of the invoices of FLM and to calculate the wholesale incentive allowance. Although it required 365 hours of your deponent's time and 138 hours of other certified accountants retained by your deponent to aid him, to wit, Morris Isreal and Jack Brand, to perform the necessary accounting work, it would have taken your deponent more hours had it not been for the fact that your deponent was the accountant for the plaintiff. It should also be pointed out that ordinarily it requires a great amount of time for the accountant and/or economist in an antitrust action to explain to counsel the various means of calculating damages and to prepare for presenting that testimony on trial. In this case a large portion of that time was saved by the fact that you deponent, while acting as counsel for the plaintiff, was also

its accountant and was thus able to himself testify as to the damages sustained by the plaintiff, as well as making it easier for your deponent and the Julien firm to present the damage portion of this action at trial.

After the trial of this action, the Court at a conference on January 16, 1975, requested counsel to submit extensive post-trial memoranda, and after rendering a verdict in favor of the plaintiff on liability on December 19, 1975 having found that the defendants had violated Section 2(a) of the Robinson-Patman Act and discriminated in price against the plaintiff, the Court scheduled February 6, 1975 for a further hearing on damages and your deponent has spent a substantial amount of his time between December 19, 1975 to date in preparing an analysis of the plaintiff's damages for that hearing as requested by the Court.

Since one of the factors which is to be considered by the Court upon an application for reasonable attorney's fee is the standing of counsel at the bar. Your deponent feels compelled to set forth his background.

Your deponent received a law degree from New York Law School in October of 1952. In addition, your deponent was licensed as a certified public accountant in New York State in 1941. Your deponent was admitted to practice in New York State courts, the United States District Courts for the Eastern and Southern Districts of New York, the Tax Court, The Court of Claims, the Supreme Court of the United States, Customs Court and the Court of Military Appeals.

During World War II, your deponent represented the United States Navy as an agent in the negotiated settlement of war contracts, including the projection of income lost due to the interruption of those contracts.

Cases in which your deponent has been counsel include Husin v. N.Y. Stock Exchange (USDC,SDNY), 70 Civ. 5650 (class action for violation of the securities laws); State of New Jersey [illegible]bott Laboratories, et al. (USDC, DNJ) (an antitrust action); and in the Matter of First Devonshire Corp. (USDC,SDNY), 70B 739.

Throughout the years your deponent has acted as legal counsel to clients in matters involving corporate, SEC, tax and antitrust problems as well as problems dealing with price control, pension laws and business reorganizations.

Your deponent has been active as a member of numerous professional groups, having acted as Chairman of the Corporate Law Committee of the Rockland County Bar Association and has been a member of the American Bar Association, New York State Bar Association, Committee on Antitrust Law; New York County Lawyers Association, and the American and New York Institute of Attorneys-CPAs.

As previously stated, your deponent has expended a total to date of 1,277 hours in acting as an attorney for the plaintiff in the prosecution of this claim and he anticipates that additional time will be expended during the damage hearing

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currently scheduled for February 6, 1976. In addition, your deponent has expended 365 hours of his time as an accountant in preparing the plaintiff's damage claim in this action. Other than your deponent's own time, 157 hours have been expended by paralegals and 138 hours by accountants retained by your deponent to assist him in preparing the plaintiff's damage claim. Your deponent's usual and ordinary hourly rate for the services performed are as follows:

Legal	No. of Hrs.	Hourly Rate	Total
David L. Wasser	1,277	$100	$127,700
Paralegals	157	15	2,355
Accounting			
David L. Wasser	365	$100	$36,500
Other CPAs	138	75	10,350

Thus, under your deponent's ordinary hourly billing, your deponent's regular fees for his services alone would amount to $127,700, and the regular fees for his legal and accounting services rendered in this action would amount to $164,200. The legal fees and accounting fees for your deponent, the paralegals and other CPAs amount to a total of $176,905 under your deponent's ordinary billing rates. This is without taking into account the fact that your deponent accepted this matter on a contingency basis and he would receive no fee if the plaintiff were not

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successful. The courts in the past have made it clear that plaintiff's counsel is entitled to a bonus for the risk he takes in accepting a matter of this nature on a contingency fee basis.

Your deponent's office diaries, records and tapes will substantiate the hours claimed above. However, for the convenience of the Court, the following breakdown is being submitted:

Pre-Complaint Period

During the pre-complaint period, from October 1972 up to February 15, 1973, your deponent had numerous conferences with defendants' counsel, with the plaintiff and with the Federal Trade Commission. After these conferences proved unsuccessful, your deponent then commenced extensive legal research prior to framing the complaint which was finally served in this action on February 15, 1973.

Time expended - 280 hours

Complaint to Withdrawal of Preliminary Injunction

On May 21, 1973, plaintiff moved for a preliminary injunction to prevent the defendants discriminating in price against the plaintiff during the pendency of this action. There were numerous affidavits and supporting memoranda filed by the plaintiff in support of its motion and by the defendants in opposition thereto. Finally, on March 25, 1974, at a conference before [illegible] and with the agreement that the action would be

brought on for a speedy trial, plaintiff withdrew its motion for a preliminary injunction. In this Court's opinion of December 19, 1975, the Court, as part of the relief granted to the plaintiff for the defendants' violation of the antitrust laws, did grant it an injunction enjoining the defendants from any future violations of the antitrust laws.

Time Expended - 335

Discovery and Trial Preparation

During the pendency of this action, the plaintiff served a set of interrogatories upon the defendant on March 20, 1974, which interrogatories were answered and objected to on April 18, 1974 by the defendants. In addition, on July 11, 1974, notice of deposition of J. M. Rowlands was served, and the deposition of both Mr. Rowlands and James R. Rose, employed by the defendants, were conducted in September 1974. Plaintiff's counsel also expended a substantial period of time in doing everything necessary for the trial of this action.

Time Expended - 409

Trial

This action was tried before the Court without a jury commencing on September 23, 1974, continued on September 24, 25 and 26, 1974, and was adjourned to October 7, 1974. During this trial the defendants obtained permission to obtain [illegible] deposition as the accountant for FIM which [illegible] Monday. On October 7, 8 and 9, 1974, the trial of

this action continued and was concluded before the Court. During this time all of your deponent's time, including long hours into each evening, were spent in preparing for trial and reviewing the testimony of the previous day. During this period all of your deponent's time was devoted to the trial of this action.

Time expended - 151 hours

Post-Trial

After trial of this action, the Court requested that damage figures about which testimony had been given at the trial be supplied to it, which documents were supplied on October 11, 1974.

On January 16, 1975, a hearing was held before the Court wherein the Court requested additional memorand to be supplied to it, particularly with regard to Section 2(a) of the Robinson-Patman Act. Plaintiff's counsel submitted an 84-page memorandum of law discussing in detail Section 2(a) of the Robinson-Patman Act.

On December 19, 1975, this Court filed its opinion finding that the defendants had violated Section 2(a) of the Robinson-Patman Act and discriminated in price against the plaintiff. It then scheduled an additional hearing on damages now scheduled to be held on February 6, 1976. In preparing for the damage hearing, your deponent has expended a substantial amount

of time in updating the damage sustained by the plaintiff and preparing those damages in the form requested by the Court as to those damages which the Court indicated it would permit the plaintiff to recover.

Time expended - 102 hours

As has been set forth in the petition of STUART A. SCHLESINGER, a member of the firm of JULIEN & SCHLESINGER, P.C., in support of plaintiff's application for reasonable attorney's fee, some of the items to be considered by the Court in awarding an attorney's fee in an action of this nature are:

(i) The amount of time expended by plaintiff's counsel;

(ii) The benefit plaintiff's counsel may have had of a prior government action;

(iii) The novelty of the litigation;

(iv) Whether or not the action was taken on a contingency basis;

(v) The manner in which plaintiff's counsel prosecuted the claim; and

(vi) The result achieved.

In this case your deponent alone, aside from the time expended by JULIEN & SCHLESINGER, P.C., expended 1,277 hours to date for legal work and 365 hours for accounting regarding damages

in this action which, at your deponent's billing rates would be $164,200.

There was no prior government action which the plaintiff relied upon. The Federal Trade Commission, although being advised of the defendants' actions, failed to commence a proceeding. This Court is well aware of the difficulty plaintiff had in presenting its claim, particularly with regard to Section 2(a) of the Robinson-Patman Act, since the plaintiff was not a direct purchaser from the defendants.

Plaintiff's counsel accepted this litigation purely on a contingency basis so if it was unsuccessful there would be no compensation at all. The Court is familiar with the caliber work performed by plaintiff's counsel and similarly with the result obtained by plaintiff's counsel, the result being not only the dollars recovered by the plaintiff for damages suffered in the past, but the award of a permanent injunction by the Court making it possible for the plaintiff once again to run a profitable business. The achievement of such a result against the superior manpower and financial resources of the Ford Motor Company and their counsel, Sullivan & Cromwell, is not to be taken lightly.

In light of the foregoing, it is respectfully requested that plaintiff's application for a reasonable attorney's fee in the amount of $425,000 is not excessive and be granted in all

DAVID L. [illegible]

[illegible] this
January, 1976

Schlesinger Ex. B
Ex 6

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

: 73 Civ. 713 (TPG)

: Affidavit of Stuart A. Schlesinger in Support of Plaintiff's Counsel's Petition for a Reasonable Attorneys Fee Pursuant to 15 U.S. 15

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

STUART A. SCHLESINGER, being duly sworn, deposes and says:

I am a member of the firm of Julien & Schlesinger, P.C., trial counsel for the plaintiff herein. This affidavit is being submitted in support of the petition by plaintiff's trial counsel in this action for a reasonable attorneys fee as provided for by the antitrust laws, 15 U.S.C. 15.

From the date that the complaint in this action was first filed on February 15, 1973, this action has been pending before this Court and this Court is therefore aware of the history and complexity of this litigation.

This action was initiated by the plaintiff after the defendants made a concerted effort to drive the plaintiff out of business. This Court's opinion dated December 19, 1975 reviews the factual history of this action and it need not be repeated here. Suffice it to say that after a seven-day trial

before this Court commencing on September 23, 1974 and terminating on October 9, 1974. There were 966 pages of testimony taken and extensive legal memoranda filed by counsel for both sides.

On January 16, 1975, due to the complexity of the issues, the Court requested counsel to submit additional briefs particularly with respect to Section 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a). In response to the Court's request, plaintiff's counsel submitted a 82-page brief providing a careful analysis of the Robinson-Patman Act in the course of which preparation, counsel for the plaintiff literally reviewed every case decided under the Robinson-Patman Act and most of the literature concerning the Robinson-Patman Act which exists in the form of law review articles and textual materials.

On December 19, 1975 this Court rendered a 68-page opinion finding that the defendants had not violated Sections 1 and 2 of the Sherman Act, but that the defendants had violated Section 2(a) of the Robinson-Patman Act and that the plaintiff could recover for those damages it had suffered by reason of the defendants' violation of the Robinson-Patman Act. The Court also scheduled a hearing on damages which is presently scheduled to be held on February 6, 1976.

This Court is aware that your deponent's firm was not engaged as trial counsel in this action until July 30, 1974. Initially, David L. Wasser, plaintiff's counsel of record, had been prosecuting the action on behalf of the plaintiff. Since your deponent's firm was not involved in this action until July 30, 1974, it is relying upon the affidavit of Mr. Wasser to show the efforts by plaintiff's counsel up to that point. However, after your deponent's

firm was retained, your deponent, Alfred S. Julien, the senior partner in your deponent's firm who acted as trial counsel for the plaintiff in this action and David Jaroslawicz, a senior associate in our office, all devoted a substantial portion of their time between July 30, 1974 and September 23, 1974, the date upon which the trial of this action commenced, preparing for trial and expende all of their time between September 23, 1974 and October 9, 1974 during the trial of this action actively participating in the trial.

After the trial of this action was completed, counsel again expended a substantial amount of time in preparing extensive legal briefs with respect to both liability and damages and after this Court's decision of December 19, 1975, finding that the defendants had violated Section 2(a) of the Robinson-Patman Act, and scheduling a further hearing on damages, presently scheduled for February 6, 1976, your deponent's firm again expended a substantial amount of time in preparing to present the damage aspect of this action to the Court.

From the time that my firm was engaged to act as trial counsel in this action, we expended a total of 827 hours in prosecuting this action. Of these hours, 197 hours were expended by Alfred S. Julien, the senior partner in our firm, 268 hours were expended by myself and 362 hours were expended by David Jaroslawicz, a senior associate in our office. Thus there were 465 hours of partners' time expended and 362 hours of associate's time expended by my firm in the prosecution of this action.

A complete history of the qualifications of all of the persons who contributed their time to the prosecution of this action will be set forth later in this affidavit as will also be a complete listing of the various specific

matters in this litigation as reflected in our firm's books and records with respect to the amount of time expended by each individual on each matter. A complete description of all of the taxable costs and disbursements has been provided in the accompanying petition.

A Brief History of the Action

The plaintiff was an independent dealer selling crash parts for Ford automobiles. Ford sells crash parts only through franchised Ford dealers. The plaintiff had an arrangement with various franchise dealers to purchase a large quantity of parts from them and to pay them a small percentage above their cost.

In 1968 Ford established the wholesale incentive allowance giving franchised dealers an additional discount for those parts which they sold rather than used in their own repair shops. Commencing in November 1972, Ford advised its dealers that it would no longer permit them to receive such an incentive for parts which they sold to the plaintiff. The plaintiff then commenced this action charging the defendants with conspiring to restrain trade, a violation of Section 1 of the Sherman Act; attempting to monopolize the after market in crash parts in violation of Section 2 of the Sherman Act; and discriminating in price against the plaintiff in violation of Section 2(a) of the Robinson-Patman Act. This action was initially commenced by plaintiff's counsel of record in this action, David L. Wasser. After the filing of the complaint, the record reveals that discovery was conducted and the plaintiff moved for a preliminary injunction in May 1973. On or about March 25, 1974, the plaintiff withdrew his motion for a preliminary injunction and the Court ordered [illegible] brought on for a speedy trial.

After this action was scheduled for trial in July 1974, your deponent's firm was retained to act as trial counsel in this matter. At the time your deponent's firm was retained, this action was not ready for trial. There had been no depositions taken of the defendants and the plaintiff's case was not ready to proceed. This Court had scheduled a trial of this action for September 23, 1974. In the short intervening period between July 30, 1974 and September 23, 1974, your deponent's firm devoted a substantial portion of its time to prepare this action for trial. During that period we managed to obtain the depositions of James R. Rose and Morris R. Rowlands, two of the defendants' principal witnesses who were to testify at the trial of this action and prepared the plaintiff's case for trial.

Immediately prior to and after the commencement of the actual trial on September 23, 1974 through October 9, 1974 Alfred S. Julien, who acted as trial counsel for plaintiff, your deponent and David Jaroslawicz devoted all of their time to the trial of this action. After the trial of this action was completed, your deponent's firm again devoted substantial periods of time preparing briefs, particularly with respect to the Robinson-Patman portions of the case and after this Court's decision on December 19, 1975 scheduling a hearing for damages preparing to present the plaintiff's claims for damages to the Court.

This Court is aware of the complexity of the issues in this matter and in particular the complex nature of the issues involving Section 2(a) of the Robinson-Patman Act and its application to the plaintiff, who was not a direct purchaser from the defendants. The novelty of the issues involved and their complexity required counsel to devote substantially more of their time to this matter than to other antitrust actions of a similar nature.

Section 4 of the Clayton Act, 15 U.S.C. 15, provides that any plaintiff who is successful, in addition to treble damages, may also recover the costs of the suit and a reasonable attorneys fee. This affidavit is being submitted in support of the plaintiff's application to be awarded a reasonable attomeys' fee in this matter. Since counsel fees are based in part upon the experience, reputation and ability of counsel, I am setting forth a biography of all of the persons in your deponent's firm who participated in this action.

Brief Description of Attorneys
Rendering Services

Alfred S. Julien

Alfred S. Julien is the senior partner in the lawfirm of Julien & Schlesinger, P.C., Two Lafayette Street, New York, New York.

Mr. Julien was admitted to the bar of the State of New York in 1933 and has actively practiced law since that time specializing in trial and appellate practice. He is a Professor of Law at the New York Law School, New York City; a lecturer of the Practicing Law Institute, New York City, a

visiting lecturer at Brooklyn Law School; he has served as Chairman and member of the faculty at numerous seminars conducted by the New York Law Journal, the official legal publication of the First Judicial Department of The State of New York. These seminars include such subjects as the new Federal Rules of Evidence and class actions.

He has been a member of the faculty of the Law School of Rutgers University Continuing Legal Education Division, Newark, New Jersey as well as a member of the summer faculty of Hastings Law School, California

Mr. Julien is also an author of many legal papers which have appeared in the New York Law Journal, New York City; and New York State Bar Journals; Kansas State Bar Journal; Mississippi State Bar Journal; Trial Lawyer Advocate and is presently, and has been for some time, a regular contributing feature columnist for the New York Law Journal.

Mr. Julien is a past president of the American Trial Lawyers Association, Metropolitan Trial Lawyers Association and the New York State Trial Lawyers Association. He has also been chairman of the Board of Editors of TRIAL, a legal periodical having the largest circulation in the country.

Mr. Julien has for years lectured and continues to do so at the present time at various state bar association meetings throughout the country. He has lectured at Harvard during August 1975 and addressed the Federation of Bar Associations of the Sixth Judicial District of New York on September 13, 1975.

In addition to being a member of the Bar of the State of New York, Mr. Julien has also been admitted to the United States Supreme Court and to the Court of Appeals for the Second Circuit. He is a member of the Bar of the District of Columbia, United States District Court for the Southern and Eastern Districts of New York, the Eastern District of Maryland and the District of Connecticut.

Mr. Julien has on many occasions been invited to address radio and TV audiences on the subject of trial advocacy. He has tried cases throughout the United States where he has been requested to act as special trial counsel.

Mr. Julien is an experienced trial lawyer who has been involve in representing both plaintiffs and defendants in numerous matters including antitrust cases for the past forty years. See, e.g., Ring v. Author's League of America, 186 F.2d 637 (2d. Cir. 1951) and is currently counsel in the following antitrust cases: Shayne v. National Hockey League (E.D.N.Y., 71 Civ. 1537); and Claitor v. West Publishing Company (D.C. Minnesota, 3-71 Civ. 267). Mr. Julien is co-liaison counsel for plaintiffs in the Penn Central Securities Litigation, 347 F.Supp. 1327(E.D.Pa. 1972); and was also one of plaintiff's counsel in Grad v. Memorex Corporation, 61 F.R.D. 88 (N.D. Cal. 1973), recently settled in the United States District Court for the Northern District of California; one of plaintiff's counsel In Re Sensitron, Inc., a shareholders class action in the United States District Court for the Central

District of California (#89-185). He is also one of plaintiffs' counsel in Greer v. Occidental Petroleum Corp., multiple shareholders class actions, United States District Court, Central District of California (Civil #71-591-RJK).

Mr. Julien was counsel for the objectors in White v. Auerbach 509 F.2d 822 (2d. Cir. 1974) and on appeal to the Second Circuit was awarded a fee for his efforts on behalf of the objectors in enhancing a class action settlement. He is counsel for the plaintiffs in Rich v. New York Stock Exchan (2d. Cir. August 8, 1975, 676 September Term, 1974), a class action arising out of the SIPC liquidation of Weis Securities.

Mr. Julien was counsel for the plaintiffs in Hanley v. Kleindienst, 471 F.2d 823, cert. den., 412 U.S. 908; appeal after remand, 484 F.2d 448, cert. den. 94 S.Ct. 1934; and Hanley v. Mitchell, 460 F.2d 64 cert.den., 409 U.S. 990, appeal after remand, 471 F.2d 823, cert. den., 412 U.S. 908, which has become perhaps the leading environmental case in the United States. In addition, Mr. Julien has litigated thousands of cases to a successful conclusion.

Stuart A. Schlesinger

Your deponent Stuart A. Schlesinger was admitted to the Bar of the State of New York in 1962 and has actively practiced law since that date. He is a partner in Julien & Schlesinger, P.C., a firm specializing in trial and appellate practice. He is a member of the bar of the United States Supreme Court and of the United States District Court for the Southern and Eastern Districts of New York.

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He is a member of the American Bar Association; American Trial Lawyers Association, of which he is also a State Committeeman; Association of the Bar of the City of New York; New York State Trial Lawyers Association, of which he is a director; Metropolitan Trial Lawyers Association, of which he is a member of the Executive Committee; Bronx Bar Association; and the New York State Bar Association.

Your deponent has actively participated in and had responsibility for prosecuting the following antitrust actions, among others, on behalf of the firm:

M. Sobol, Inc. v. Averst Laboratories (S.D.N.Y., 70 Civ. 1920); Shayne v. National Hockey League (E.D.N.Y., 71 Civ. 1537); and Claitor v. West Publishing Company (D.C.Minn., 3-71 Civ. 267).

Your deponent was counsel to the Economics Committee of the 1966 Constitutional Convention of the State of New York and appeared on numerous media programs concerning the role of the trial lawyer. Your deponent has also been asked to lecture to attorneys at the American Trial Lawyers Association Convention and has lectured to bar associations throughout the United States.

David Jaroslawicz

David Jaroslawicz was admitted to the Bar of the States of New York and California in 1972, has received an LL.M. degree from New York University School of Law in 1974, concentrating on the securities and antitrust

Mr. Jaroslawicz has been associated with the firm of Julien & Schlesinger, P.C. since 1971. His responsibilities have been and still are primarily in the field of securities and antitrust litigation.

Mr. Jaroslawicz has actively participated in all of the depositions discovery and trial had in this action and has actively participated in the discovery aspects of various other complex securities and antitrust actions, including M. Sobol, Inc. v. yerst Laboratories, supra, Rich v. New York Stock Exchange, supra, and Claitor, et al. v. West Publishing Company, supra.

In addition, Mr. Jaroslawicz has acted as trial counsel for our office most recently in October 1975 obtaining a verdict of over $700,000 in a securities fraud action entitled Lehmann v. Merrill Lynch, Supreme Court, New York County, Index No. 07863/74.

Description of Work Done and Time Expended by Julien & Schlesinger, P.C.

Pretrial preparation and discovery

After your deponent's firm and Alfred S. Julien, the senior partner in your deponent's firm were engaged as trial counsel in this action by the plaintiff on or about July 30, 1974 and advised that a firm trial date of September 23, 1974 had been scheduled, your deponent's firm immediately began extensive preparations to prepare for the trial of this action.

Alfred S. Julien, your deponent and David Jaroslawicz spent time reviewing all of the documents received from the defendants, as well as the documents in the plaintiff's possession which would be necessary for a trial of this action. Your deponent's firm was advised that the Court had directed plaintiff's counsel to file a pretrial memorandum of law on August 22, 1974 and expended a great amount of time in preparing this memorandum as well as a subsequent reply memorandum responding to the defendants' pretrial memorandum.

On September 6, 1974 your deponent and David Jaroslawicz conducted the depositions of Morris J Rolands, the General Sales Manager of the Parts Division of Ford Motor Company, and who was one of the defendants' principal witnesses at the trial of this action. Your deponent and David Jaroslawicz also conducted the deposition of James R. Rose, the District Sales Manager for the Parts Division of Ford Motor Company, another of the defendants' principal witnesses at the trial of this action. Your deponent's firm spent a substantial amount of time in preparing, conducting and later reading and analyzing these depositions which were to be critical at the trial.

Prior to the trial of this action, plaintiff's counsel spent a great amount of time agreeing upon a pretrial order with counsel for the defendants which pretrial order stipulated to many facts and greatly expedited the trial of this action. In addition, plaintiff's counsel served subpoenas, prepared exhibits concerning the plaintiff's damages and reviewed the testimony of those witnesses who were to be presented on the plaintiff's case. Needless

to say, this Court is aware of the large amount of time and effort which must be expended in preparing for the trial of any action, and much more so in an antitrust action with the complex factual and legal issues presented in this case. Plaintiff's counsel for several weeks prior to the commencement of the trial of this action worked late into the evening and on weekends in preparing for trial.

Up to the time of trial, your deponent's firm expended a total of 273 hours which are divided as follows:

Alfred S. Julien	62
Stuart A. Schlesinger	83
David Jaroslawicz	128

Trial Period

On September 23, 1974 the trial commenced in this action before the Court without a jury. The trial was continued on September 24, September 25, September 30, October 7, October 8 and October 9. During that period the persons in your deponent's firm expended all of their time, sometimes approaching 16 hours per day in the trial of this action, preparation of witnesses and/or cross-examination for the next day's testimony and a review of the prior day's testimony. In addition, in the middle of the trial, the Court permitted the defendants to take the testimony of David L. Wasser as an accountant for FLM with respect to its testimony on damages. On Sunday, September 29, 1974, Mr. Wasser's deposition was taken, which

deposition was attended by your deponent and David Jaroslawicz as counsel for Mr. Wasser. During the trial of the action plaintiff's counsel submitted several different memoranda of law with respect to various issues in the action as they arose requiring the attorneys working on this matter, as well as the secretarial staff at your deponent's office to work long hours into the night.

In the period that this action was tried, commencing on September 23, 1974 and terminating on October 9, 1974, the attorneys in your deponent's firm expended a total of 293 hours which were divided as follows:

Alfred S. Julien	88
Stuart A. Schlesinger	96
David Jaroslawicz	109

Post Trial Period

After the trial of this action was completed, the Court requested plaintiff's counsel to submit additional documents concerning damages which were submitted in mid-October 1974.

Subsequently on January 16, 1975 a conference was held before the Court at the Court's request at which time the Court requested counsel to submit additional memoranda of law particularly with respect to Section 2(a) of the Robinson-Patman Act. The Court requested counsel to concentrate on the question of whether or not the plaintiff could recover and had standing to sue since the plaintiff was not a direct purchaser from the defendant.

In compliance with the Court's request, counsel for the plaintiff prepared a comprehensive memorandum of law of some 82 pages discussing in great detail the legislative history, case law and secondary authorities and their opinions concerning the meaning and intent of Section 2(a) of the Robinson-Patman Act. In the course of the preparation of this memorandum, plaintiff's counsel literally reviewed almost everything which had been written concerning Section 2(a) of the Robinson-Patman Act.

During this post-trial period plaintiff's counsel expended 182 hours which were divided as follows:

Alfred S. Julien	31
Stuart A. Schlesinger	62
David Jaroslawicz	89

Period Subsequent to December 19, 1975

On December 19, 1975 this Court issued a 68-page opinion finding that the defendants had violated Section 2(a) of the Robinson-Patman Act and that the plaintiff had standing to sue as an injured party. The Court scheduled February 6, 1976 for an additional hearing on damages and requested counsel to prepare a proposed form of injunction, enjoining the defendants from any future price discrimination against the plaintiff.

Following the December 19, 1975 opinion of the Court, plaintiff's counsel has expended a great deal of time in preparing the issue of damages to be presented to the Court, preparing a proposed judgment and permanent

injunction and preparing a petition requesting that the plaintiff be awarded a reasonable attorneys fee and the costs of this action as provided for by 15 U.S.C. 15.

From December 19, 1975 to date, the plaintiff's counsel have expended 79 hours which are divided as follows:

Alfred S. Julien	16
Stuart A. Schlesinger	27
David Jaroslawicz	36

The foregoing does not include the time still to be expended by plaintiff's counsel upon the damage hearing, form of the injunction and various other matters still to be heard before the Court.

In this case your deponent's firm has expended a total of 827 hours on behalf of the plaintiff in prosecuting this action. This is in addition to the 1,277 hours expended by plaintiff's counsel of record, David L. Wasser. The Court should keep in mind that the time expended by plaintiff's counsel was substantially reduced by the fact that David L. Wasser in addition to being plaintiff's counsel of record was also a certified public accountant and acted as the plaintiff's accountant, thus enabling plaintiff's counsel to become familiar with and present the damage portion of this case to the Court in much less time than would ordinarily be required.

Plaintiff's counsel in this case did not have the benefit of any prior governmental decree and although the Federal Trade Commission was aware of the defendants' actions, it did not commence any proceedings. It

Plaintiff's counsel accepted this litigation solely on a contingency basis so that if the plaintiff was unsuccessful, plaintiff's counsel would receive no compensation at all. Due to the efforts of plaintiff's counsel, the plaintiff has been successful at a trial of this action. It is in the public interest to have the antitrust laws properly enforced and a plaintiff who takes upon itself to do so should be awarded an adequate counsel fee taking into account all of the risks of the litigation so that plaintiffs in the future will be able to obtain experienced and competent counsel. The achievements of the plaintiff and its counsel in this action against the superior resources of Sullivan & Cromwell, one of the nation's leading lawfirms, with the economic resources of the Ford Motor Company behind them, and their legal fees assured, should not be taken for granted by the Court. Plaintiff and its counsel should be adequately compensated for the results achieved and the risks incurred in bringing this litigation.

In light of the foregoing, it is respectfully requested that the plaintiff's application for a reasonable attorneys' fee in the amount of $425,000 is not excessive and that it be granted in all respects.

Stuart A. Schlesinger
STUART A. SCHLESINGER

Sworn to before me this
23rd day of January, 1976.

Notary Public

Plaintiff's Memorandum of Law in Support of Motion to Amend and Supplement Its Complaint with Respect to Damages, February 3, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

----------x

73 Civ. 713 (TPG)

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO AMEND AND SUPPLEMENT ITS COMPLAINT WITH RESPECT TO DAMAGES

Alfred S. Julien
Stuart A. Schlesinger
David Jaroslawicz
David L. Wasser
Of Counsel

JULIEN & SCHLESINGER, P. C.
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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FLM COLLISION PARTS, INC.,	:	
Plaintiff,	:	73 Civ. 713 (TPG)
-against-	:	
FORD MOTOR COMPANY and FORD MARKETING CORPORATION,	:	
Defendants.	:	

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO AMEND AND SUPPLEMENT ITS COMPLAINT WITH RESPECT TO DAMAGES.

Introductory Statement

The plaintiff is submitting this memorandum of law in support of its application to be permitted to supplement its complaint so as to include a claim for damages suffered from the time that Ford first withheld the incentive allowance from dealers who sold to the plaintiff in November 1972 until February 6, 1976, the date that the damage hearing of this action is scheduled to proceed, and the date when the Court should issue an injunction prohibiting the defendants from discriminating against the plaintiff by withholding the wholesale incentive discount in the future.

Statement of Facts

The Court is familiar with the basic facts of this action and they need not be repeated here. On December 19, 1975 this Court in its opinion concerning liability found that the defendants had discriminated in price against the plaintiff in violation of Section 2(a) of the Robinson Patman Act and that the plaintiff was entitled to recover damages for that violation.

At a conference before the Court, the Court indicated that it would only allow the plaintiff to recover two items of damage: (a) the amount of the wholesale incentive withheld by the defendants from their franchised dealers on sales to the plaintiff; and (b) the profits lost by the plaintiff on its volume of sales which decreased after the defendants withheld the wholesale incentive.

Counsel for the defendant has refused to stipulate to permit the plaintiff to prove damages up to the date of the damage hearing and this memorandum is being submitted in support of the plaintiff's position that it should be permitted to supplement its complaint pursuant to Rule 15(d) of the Federal Rules of Civil Procedure so that it may prove the extent of its damages up to February 6, 1976 at the damage hearing held on that date, rather than be compelled to file a new complaint in this Court, move for summary judgment on the basis of liability on the ground that the Court has already decided those issues in favor of the

plaintiff and the defendant is collaterally estopped from contesting those issues and then proceed to hold a separate damage hearing at which time the plaintiff will prove its damages from the date of trial until such time as the defendant ceases to withhold the wholesale incentive allowance from the plaintiff.

POINT I

THE PLAINTIFF IS ENTITLED TO RECOVER ITS DAMAGES UP TO THE DATE OF THE DAMAGE HEARING ON FEBRUARY 6, 1976

The Second Circuit in Shayne v. Madison Square Garden Corporation, 491 F.2d 397, 401 (2d. Cir. 1974) made clear this Circuit's position with respect to damages in antitrust cases, stating:

> "It is true that the general rule in private antitrust actions is that damages arising from acts committed after the filing of the complaint may not be recovered except in a separate suit. E. g., Connecticut Importing Co. v. Frankfort Distilleries, 101 F.2d 79, 81 (2d. Cir. 1939). However, this rule does not prevent recovery where plaintiff is allowed to supplement his complaint to include subsequent acts and damages, at least to the time of trial." (emphasis added)

making it clear that the plaintiff should be permitted to supplement its complaint pursuant to Rule 15(d) of the Federal Rules of Civil Procedure to include damages "at least to the time of trial." The Circuit's language

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leaves little doubt that in Shayne it did not intend to state that a plaintiff could never recover damages for a period extending beyond the trial date if the plaintiff's damages continued beyond that date. The Second Circuit in Shayne also indicated that the district court should permit the complaint to be supplemented if no prejudice was shown by the defendant, 491 F.2d at 401.

In our case, the defendants began to withhold the wholesale incentive allowance from its franchised dealers on their sales to the plaintiff in November 1972. On February 15, 1973 the complaint was filed. The trial of this action commenced on September 23, 1974. The Court rendered its decision on December 19, 1975. The defendants in withholding the wholesale incentive discount on sales by their franchised dealers to the plaintiff continued during this entire intervening period. The plaintiff should be permitted to recover all of this damages in this one proceeding.

Rule 1 of the Federal Rules of Civil Procedure provides that:

> "They shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 15(d) of the Federal Rules of Civil Procedure provides in pertinent part:

> "Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented."

The purpose of a supplemental pleading is to bring a controversy up to date. See City of Texarkana v. Arkansas Louisiana Gas Co., 306 U.S. 188 (1939). Its purpose is to introduce newly occuring facts to supplement the relief sought in the original complaint. The purpose of the plaintiff's motion to amend at this time is to bring the controversy up to date with respect to the damages suffered by the plaintiff.

The cases and commentators have made it clear that a supplemental pleading may be filed at any stage of the case at the Court's discretion. In Otis Elevator Co. v. 570 Bldg. Corp., 35 F.Supp. 348 (E.D.N.Y. 1940), the Court held that a supplemental complaint stating additional acts of infringement could be filed after the Court had entered a judgment on liability holding that a valid patent had been infringed and the matter had been referred to a master for an accounting. See, also, Moore's Federal Practice, par. 15.16(4).

In our case, if the Court did not permit the plaintiff to supplement its complaint so as to prove damages up until the date of the damage hearing, the alternative would be for the plaintiff to simply file a new complaint, move for summary judgment on the ground that the defendants are collaterally estopped from contesting the liability in this action and then the Court would be compelled to hold a separate damage hearing as to the plaintiff's damages from the date of trial to that date. The plaintiff submits that this would be a total and complete waste of time on the part of all counsel and the Court. The Federal Rules were not intended to be construed in a fashion which is impractical for all concerned. There would be absolutely no prejudice at all to the defendants if the plaintiff was permitted to prove his damages through February 6, 1976 at the damage hearing on that date.

In the absence of any prejudice to the defendants, and in light of the great benefit to all parties and the Court if the plaintiff was permitted to prove its damages through the date of the damage hearing on February 6, 1976, it is respectfully requested that the plaintiff be permitted to supplement its complaint pursuant to Rule 15(d) of the Federal Rules of Civil Procedure so as to be permitted to prove its damages up to and through February 6, 1976.

Dated: New York, New York
February 3, 1976

Respectfully submitted,

JULIEN & SCHLESINGER, P.C.

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A Member of the Firm

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Of Counsel

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SULLIVAN & CROMWELL

ATTORNEYS FOR

Defendants' Memorandum in Opposition to Plaintiff's Proposed Judgment and Injunction and in Support of Counter-proposed Order, February 6, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

73 Civ. 713 (TPG)

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

- x

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S PROPOSED JUDGMENT AND INJUNCTION AND IN SUPPORT OF THE COUNTER-PROPOSED ORDER, JUDGMENT AND INJUNCTION

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William A. Zolbert
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Of Counsel.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

FLM COLLISION PARTS, INC.,

Plaintiff,

-against- : 73 Civ. 713 (TPG)

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

- x

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S PROPOSED JUDGMENT AND INJUNCTION AND IN SUPPORT OF THE COUNTER-PROPOSED ORDER, JUDGMENT AND INJUNCTION

This memorandum is submitted on behalf of Ford Motor Company and Ford Marketing Corporation,* defendants in this action, in opposition to plaintiff's proposed judgment and injunction and in support of the counter-proposed order, judgment and injunction. As is discussed in more detail below, defendants submit that plaintiff has failed to establish any claim for damages. However, in view of the Court's earlier expressed inclination to award plaintiff

* At the close of business on December 31, 1974, Ford Marketing Corporation was merged into Ford Motor Company. For convenience, both entities will be referred to together either as "defendants" or as "Ford".

some damages, defendants have submitted a proposed form of order, judgment and injunction which includes a provision for the award of damages up to the time of trial and provides for an amount to be entered in the event that plaintiff should demonstrate to the satisfaction of the Court its entitlement to any such award.

Moreover, defendants submit that any injunctive relief ordered by the Court should be limited to remedying the precise violation of law involved. Defendants accordingly have tendered a proposed injunction which is directed to the specific violation of the Robinson-Patman Act found by the Court.

I. PLAINTIFF HAS NOT ESTABLISHED ITS RIGHT TO ANY DAMAGES

Plaintiff's purported proof of damages continues to suffer from such serious deficiencies that we submit plaintiff has again failed to establish any right to damages. With respect to plaintiff's claim for the wholesale incentive allowance up to the time of trial, there is no evidence in the record showing what portion, if any, of the allowance would have been passed on to plaintiff by the franchised dealers from whom plaintiff purchased its crash parts. Furthermore, plaintiff's attempt to recover as damages the wholesale incentive allowance for the period after trial commenced suffers the additional fatal infirmity that such claim has not been properly brought before the

Court. In addition, plaintiff has not shown that any sales were lost at any time as a result of Ford's withdrawal of the incentive allowance to franchised dealers on sales of crash parts to FLM.

A. Plaintiff Has Not Established Its Right to the Wholesale Incentive Allowance for the Period up to the Date of Trial

Plaintiff has finally prepared a computation for the period November 1, 1972 to September 23, 1974, of its asserted claims for the wholesale incentive allowance in a manner similar to that which would have been employed by a franchised dealer claiming the allowance on sales to FLM. But such a calculation alone does not establish plaintiff's entitlement to this amount. Plaintiff must first establish that the franchised dealers from whom it purchased crash parts during this period would have passed on the full amount of the incentive allowance to FLM. See, Hanover Shoe v. United Shoe Machinery Corp., 392 U.S. 481 (1968).

There is no evidence in the record that any franchised dealer would have continued up to the date of trial to pay over to FLM any and all of the incentive allowance received by it from Ford. Indeed, we believe that the most significant evidence in the record suggests the contrary. The written contract between FLM and Central Lincoln-Mercury (D. Ex. O),

which assured FLM a supply of parts on a cost-plus basis, came to an end in July 1972 when Atlas Lincoln-Mercury assumed Central's franchise. From that time on, plaintiff had no written assurance from any active franchised dealer that it would continue to receive the incentive allowance. Each subsequent supplying dealer was free in its dealings with FLM to retain all or part of the incentive allowance on sales to FLM.*

With the evidence in such a posture we believe it to be entirely improper for plaintiff to substitute conjecture for proof that the entire incentive allowance would have been received by plaintiff up to the date of trial. For this reason, plaintiff's claim for the incentive allowance for the period prior to trial should be denied in its entirety.

B. Plaintiff Has Not Established Its Right to the Wholesale Incentive Allowance for the Period Following the Commencement of Trial on September 23, 1974

A fundamental principle of law is that no damages may be awarded for acts alleged to have been committed after the commencement of trial and for which no complaint has been made, no issue joined and no trial held. Connecticut

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* It is also noteworthy that during the period in which franchised dealers received the allowance on sales to FLM, the "mark-up" by franchised dealers on sales of crash parts to FLM was constantly subject to renegotiation as is evidenced by the fact that it varied from 2% to 3% to 5% (Trial Tr. 144-146).

Importing Co. v. Frankfort Distilleries, 101 F.2d 79, 81 (2d Cir. 1939); Flintkote Co. v. Lysfjord, 246 F.2d 368, 396 (9th Cir.), cert. denied, 355 U.S. 835 (1957).

Unless plaintiff moves to file a supplemental complaint in accordance with Rule 15(d) of the Federal Rules of Civil Procedure,* to which Ford would have an opportunity to file an answer, the purported claims for the incentive allowance for the period after trial commenced are not properly before the Court and may not be adjudicated. See Shayne v. Madison Square Garden Corp., 491 F.2d 397, 401 (2d Cir. 1974).

Moreover, in the event plaintiff serves a supplemental complaint, it is essential that plaintiff be required to prove that it would have continued to receive the entire amount of the incentive allowance from franchised dealers some three and one-half years after Ford stopped paying wholesale incentive on sales of crash parts by Atlas to FLM. Whatever limited probative value evidence that plaintiff was receiving the full incentive allowance from franchised dealers in

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* To our knowledge, plaintiff has not made any motion to serve a supplemental complaint. Plaintiff's Memorandum of Law in Support of Its Motion to Amend and Supplement Its Complaint with respect to Damages, dated February 3, 1976, certainly cannot do double duty as a motion under Rule 15(d) and as the memorandum required by Local Rule 9(b). At the very least, plaintiff should serve a copy of the proposed supplemental complaint along with the appropriate motion papers.

November 1972 may have as proof of damages for the period immediately following that date, it is of no significance in establishing either liability or damages in February 1976. None of the franchised dealers from whom plaintiff today appears to be buying crash parts has ever had any arrangement with plaintiff for the passing along of the incentive allowance either in whole or in part, so far as the record reveals.

To hold that there is proof either of liability or damages for the later period would be to disregard the independent role of the franchised dealer in passing on to plaintiff such portion of the wholesale incentive as it sees fit, to assume a state of facts as to which there is no evidence and to deny to defendants their day in court upon such issue, contrary to the requirements of Rule 15(d). See Otis Elevator Co. v. 570 Building Corp. 35 F. Supp. 348, 349 (E.D.N.Y. 1940).

C. Plaintiff Has Not Established Any Lost Sales Resulting from Defendants' Withdrawal of the Wholesale Incentive Allowance to Franchised Dealers on Sales to Plaintiff

At the post-trial conference held on December 18, 1975, the Court informed plaintiff's counsel that the Court would only consider claims for lost sales that were specifically attributable to the withdrawal of the incentive allowance to franchised dealers on sales to FLM.

Rather than making a specific showing of "lost sales" plaintiff resurrects its previously rejected claim for "growth interruption damages" or "growth increase lost" (See Defendants' Post-Trial Brief at pp. 111-114).* Plaintiff offers two formulations: one assumes a steady level of sales (Exhibit A) and the other assumes a hypothetical rate of increase in sales (Exhibit B). Either formulation of this claim, which presumably is plaintiff's interpretation of "lost sales", involves a fatal failure of proof as to causation and rests upon impermissible speculation.

First, plaintiff has maintained throughout these proceedings that it resold crash parts at the same markup after it no longer received the incentive allowance as it did when it was receiving the benefits of the allowance. That is, plaintiff was absorbing the differential and selling at the same price it would have sold had it been receiving the allowance.** It follows, therefore, that plaintiff's

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* In addition, plaintiff has also resurrected its claims for so-called "obsolescence credits" and "2% dealer premium payments"--items of damage that similarly have been rejected by the Court. The improper and purely speculative nature of these claims are thoroughly discussed in Defendants' Post-Trial Brief at pp. 96-99 and we will not extend this memorandum by repeating them here.

** Plaintiff's Post-Trial Brief makes the following assertion at p. 72:

> "Once the plaintiff could not receive the wholesale incentive allowance any longer, the plaintiff was compelled to absorb this allowance and sold crash parts to service stations and body shops for exactly the same price at which it had been selling crash parts prior to the wholesale incentive allowance being taken away from it by the defendant."

sales would have been the same even if it had been receiving the allowance. Thus any reduction in sales volume must be attributable to other factors.

Second, this conclusion is confirmed by plaintiff's own figures. Taking, for example, plaintiff's "Growth Loss - Exhibit A," it indicates that, while sales declined in fiscal years 1974 and 1975, the sales during the first half of fiscal year 1976 show a dramatic increase which if continued will result in the greatest sales year in plaintiff's history.* Yet during this entire period of fluctuating sales, franchised dealers were not receiving the incentive allowance on sales of crash parts to plaintiff. Thus it is uncontroverted that plaintiff's sales have been substantially, and recently favorably, influenced by factors other than the availability of the incentive allowance.

In addition to its wholly speculative nature, this claim is inflated on its face by approximately 52%. The trial record clearly indicates that the incentive allowance only applied to 48% of all crash parts sold to franchised dealers by Ford. (Trial Tr., 614-615) In turn, presumably, only approximately 48% of FLM's purchases would have been

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* Sales to date for fiscal 1976 are estimated by plaintiff to be $301,803 (as compared to a level sales projection of only $274,758). If the present sales rate continues, it would indicate sales of approximately $846,500 for FLM's 1976 fiscal year.

eligible for the incentive allowance. Yet, plaintiff is seeking recovery of "growth interruption damages" across the board--with no attempt to segregate "lost sales" of eligible crash parts. Certainly plaintiff could not claim any causal relation between the elimination of the incentive allowance and "lost sales" of parts not affected by the allowance. Thus, plaintiff's claim for "growth interruption damages", even if it had merit, would have to be reduced by at least 52%.

II. ANY INJUNCTIVE RELIEF SHOULD BE LIMITED TO THE PRECISE PRACTICES FOUND BY THE COURT TO BE IN VIOLATION OF THE LAW

Any injunctive relief ordered by the Court should be limited to the Court's decision of December 19, 1975 and directed solely to eliminating any price discrimination which the Court found with respect to Ford's failure to grant the wholesale incentive allowance to its franchised dealers on sales of crash parts by such dealers to FLM. As the Supreme Court stated in Schine Chain Theatres v. United States:

> "The precise practices found to have violated the act should be specifically enjoined." 334 U.S. 110, 126 (1948).

Plaintiff's proposed injunction, in contrast, seeks to enjoin a host of alleged practices totally unrelated to the specific violation of law found by the Court. Indeed, plaintiff's proposed injunction is principally addressed to violations of Sections 1 and 2 of the Sherman Act, statutory sections which the Court expressly held Ford had not violated. There is no basis for an order enjoining Ford from engaging in price fixing conspiracies, or coercion of dealers, or refusals to deal, or resale price maintenance, each of which plaintiff seeks to enjoin.

Instead, Ford submits that pursuant to the Court's decision of December 19, 1975 the only proper injunctive relief would be to require Ford to grant the wholesale incentive allowance to franchised dealers on sales by them to FLM on the same terms and conditions as Ford grants the incentive allowance to franchised dealers on sales to "eligible customers", as that term is defined and used in Ford's Policy and Procedure Manual and its Master Price List. The counter-proposed injunction is directed to this specific matter, the sole violation found by the Court.

CONCLUSION

In the event the Court should conclude that the plaintiff is entitled to any relief, the Court should enter such appropriate relief in accordance with defendants' counter-proposed order, judgment and injunction.

Dated: February 6, 1976

Respectfully submitted,

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Of Counsel.

Defendants' Memorandum in Response to Plaintiff's Petition For an Award of Attorneys' Fee and Costs, February 6, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

- x

73 Civ. 713 (TPG)

DEFENDANTS' MEMORANDUM IN RESPONSE TO PLAINTIFF'S PETITION FOR AN AWARD OF ATTORNEYS' FEES AND COSTS

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

FLM COLLISION PARTS, INC.,

Plaintiff,

-against- : 73 Civ. 713 (TPG)

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

- x

DEFENDANTS' MEMORANDUM IN RESPONSE TO PLAINTIFF'S PETITION FOR AN AWARD OF ATTORNEYS' FEES AND COSTS

The Court is granting judgment to plaintiff under two separate sections of the Clayton Act: damages under Section 4 (15 U.S.C. § 15) and injunctive relief under Section 16 (15 U.S.C. § 26).

Section 4 provides that a plaintiff may recover "the cost of suit, including a reasonable attorney's fee" with respect to a claim for damages; but significantly there is no comparable statutory provision allowing such recovery with respect to a claim for injunctive relief under Section 16. The law has long been settled that no recovery for attorneys' fees is to be awarded with respect to a judgment for injunctive relief under the Clayton Act. Decorative Stone Co. v. Building Trades Council, 23 F.2d 426, 428 (2d Cir.

1928) (per L. Hand, Swan, A. Hand, C.J.).

There is the further limitation on the amount of attorneys' fees recoverable that they be for the work which produced the actual recovery in the action. As Judge Wyzanski observed in Union Leader Corp. v. Newspapers of New England, Inc.:

> ". . . such a partially successful antitrust plaintiff can recover from the antitrust defendant only on account of such portion of the attorney's effort as produced a recovery." 218 F. Supp. 490, at 492 (D. Mass. 1963).

The petition disregards these overriding limitations upon any award of attorneys' fees in this action. It stresses the importance of the injunctive portion of the judgment and the work done regarding that aspect of the case. In addition, it indicates that a very substantial portion of the time spent related to the rejected Sherman Act claims. At the same time, however, the petition provides only very limited information as to how the attorneys' work should be apportioned among the various facets of the case, so as to eliminate the work done in relation to the injunctive aspect and in relation to the rejected

Sherman Act claims.*

From the information provided, it seems fair to conclude that at least half of the 2104 hours of lawyer time claimed to have been spent on this case by plaintiff's various attorneys related to the injunctive aspect of the case and that a major portion of the remaining time related to the rejected Sherman Act claims. Such portions of counsel's work in this matter should be no part of the present application.

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* Plaintiff's reliance on Merola v. Atlantic Richfield Co., 515 F.2d 565 (3d Cir. 1975) for the proposition that attorney fees may be awarded where the benefits conferred are non-pecuniary (Fee Petition, p. 11) is entirely misplaced. That case involved the award of attorney fees in the context of settlement of an antitrust action, a context in which Clayton Act, Section 4 has no application. Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 487 F.2d 161, 164 (3d Cir. 1973). Instead, courts have applied the so-called "equitable trust doctrine" to award attorney fees where the plaintiff has settled. Under this doctrine, an award may be made regardless of the nature of the settlement. In short, since the limitation on attorney fees to damage awards under Section 4 is absent in settled antitrust actions, courts are free to consider non-pecuniary, as well as pecuniary, benefits in determining a fee award--a freedom statutorily forbidden to courts in litigated antitrust actions such as this one.

Until a fuller showing is made by plaintiff's attorneys of how their time was spent and the basis for their extraordinary claim, no reasonable assessment can be made of an appropriate award under Section 4 of the Clayton Act. But it is beyond doubt that the claim in the petition is vastly inflated, contains impermissible elements and must be slashed by at least 75%.

A. An Evidentiary Hearing Should Be Held upon a Full Record of All Relevant Information

The law in the Second Circuit is clear: Attorney fees may only be awarded after an evidentiary hearing is held in which the opposing party is afforded an opportunity for cross-examination. City of Detroit v. Grinnell Corp., 495 F.2d 448, 472 (2d Cir. 1974). In Perkins v. Standard Oil Co., 399 U.S. 222 (1970), cited in Grinnell, the Supreme Court declared:

> "[T]he amount of the award for such services should, as a general rule, be fixed in the first instance by the District Court, after hearing evidence as to the extent and nature of services rendered." 399 U.S. at 223 (emphasis added).

Plaintiff's attorneys have applied for attorneys' fees of $425,000--an amount which far exceeds any objective appraisal of the value and worth of their services. Apparently,

aware of the gross disparity between the amount of their fee application and any monetary recovery, counsel claim that the principal benefits of their legal services is the obtaining of injunctive relief in favor of FLM. (Fee Petition, p. 6) In view of this claim, as well as others which require substantial and additional downward adjustment in any fees awarded, and because plaintiff's counsel have not submitted documentation necessary to support the conclusory statements made in the fee petition and the supporting affidavits, Ford requests the Court to defer consideration of any fee award until a full record of all relevant information is placed before the Court by plaintiff's attorneys and defendants' attorneys are given a fair opportunity to review this information and to cross-examine the applicants regarding such information.

B. Relevant Factors to the Court's Determination

The controlling authorities establish a litany of factors to be considered in determining an award of reasonable attorneys' fees. Rather than adhere to that unfocused procedure, we discuss below those particular matters that are most appropriately at issue in this case.

1. Time Spent. This is the most important factor: both the total number of hours and by whom and how the time was spent. As the Second Circuit stressed in Grinnell, supra:

> "The starting point of every award, once it is recognized that the court's role in equity is to provide just compensation for the attorney, must be calculation of the attorney's services in terms of the time he has expended on the case. Anchoring the analysis to this concept is the only way of approaching the problem that can claim objectivity, a claim which is obviously vital to the prestige of the bar and the court." 495 F.2d at 470; accord, Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corporation, 487 F.2d 161 (3d Cir. 1973).

To this end, plaintiff's counsel should introduce into evidence billing records, charge slips or entry reports made contemporaneously with the services performed. "[W]ithout some fairly definite information as to the hours devoted to various general activities, e.g., pretrial discovery, settlement negotiations, and the hours spent by various classes of attorneys, e.g., senior partners, junior partners, associates, the court cannot know the nature of the services for which compensation is sought." Lindy Bros. Builders, supra, at 167.

Where, as here, several attorneys are filing a joint petition for fees, the Court should employ different hourly rates for the different attorneys and further adjust the rate for the different activities engaged in by counsel. Grinnell, supra, at 471

In addition, the Court should deduct those hours that were attributable to seeking injunctive relief and to presenting rejected theories of liability.

As we have noted, Section 16 of the Clayton Act does not provide for the award of attorney fees in connection with the issuance of injunctive relief, and the time attributable to such work therefore may not be included in the fee award. Decorative Stone Co. v. Building Trades Council, 23 F.2d 426, 428 (2d Cir. 1928); Milgram v. Loew's Inc., 192 F.2d 579, 586-87 (3d Cir. 1951); Ring v. Spina, 84 F. Supp. 403, 408 (S.D.N.Y. 1948). For example, Mr. Wasser claims to have spent 335 hours in connection with seeking preliminary injunctive relief (Wasser afft., pp. 10-11), and Mr. Schlesinger asserts that "a great deal of time" has been spent preparing the "proposed judgment and permanent injunction. . . ." (Schlesinger afft., pp. 15-16). These hours should be excluded entirely. But also the Court should allocate the remaining hours on a reasonable basis between services attributable to the damage award and the injunction. Since plaintiff's counsel claims that the most important result of their services is the contemplated injunctive relief, it would seem reasonable to allocate at least one-half of the remaining hours to the injunction in line with counsel's own assessment of the value of their services.

Finally, the hours spent by counsel in unsuccessfully attempting to show a violation of Sections 1 and 2 of the Sherman Act and in calculating various items of damages rejected by the Court should be deducted from any remaining figure of time spent. As Judge Pollack admonished in Vanderveld v. Put and Call Brokers and Dealers Assoc.:

> "The fee awarded should not include compensation for time expended upon theories of liability or overdrawn items of damage ultimately rejected by the trier of fact." 344 F. Supp. 157, at 160 (S.D.N.Y. 1972).

2. Downward Adjustments. In contrast to the arbitrary addition of $200,000 to plaintiff's attorneys' evaluation of their time spent in this case, we submit that the record requires substantial downward adjustments from the fees sought purely on an hourly basis.*

(a) Unrelated pre-complaint activities. All time expended prior to the filing of the complaint and unrelated to the conduct of this litigation should be

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* In support of their position plaintiff's counsel cite a number of cases awarding sizeable attorneys' fees (Petition p. 13). Yet they were unable to find a single case awarding more than one third of a treble damage award or the equivalent, that is, of an amount equal to a single damage award. Interestingly, in one case relied upon by plaintiff's counsel where $100,000 was awarded for attorneys' fees, which equalled the $100,000 single damages awarded, counsel had expended 12,912 hours through trial. That award of attorneys' fees amounted to $7.74 per hour. Twentieth Century Fox Corp. v. Goldwyn, 328 F.2d 190 (9th Cir.), cert. denied, 378 U.S. 880 (1964).

entirely excluded. For example, Mr. Wasser claims to have spent a substantial portion of his time before the filing of the complaint holding unsuccessful conferences with the Federal Trade Commission attempting to get the Commission to act in this matter and with defendant's counsel seeking an adjustment of the matter. Assuming arguendo their validity, these hours should be deducted unless counsel can satisfactorily demonstrate that they contributed directly to the subsequent recovery in this case.

(b) Quality of representation. From the institution of this action in February 1973, it has been characterized by diffuse and indiscriminate allegations and by the absence of legal analysis of the essential elements of the various claims asserted. Boilerplate charges of antitrust allegations were made without relation to the particular facts of the case. As a result, the case was presented for trial upon a wide range of theories which the Court found wholly lacking in merit and for which there was no support in the evidence.

It was the Court, in the last analysis, and not plaintiff's counsel, which identified a basis upon which plaintiff might recover in this action. Nowhere in the plaintiff's pretrial submissions was the Court's rationale urged or anticipated.

In such circumstances, the actual contributions of plaintiff's counsel to any success of plaintiff in the prosecution of this action have been unusually small.

The papers submitted in support of the fee application by plaintiff's attorneys fail to take into account the professional inadequacy, irrelevancy and duplicative character of much of the work performed. These qualities in the professional work contributed substantially to increasing the time consumed by the Court and all counsel in the trial of this action and in the extensive post-trial consideration of the case. Such needless proliferation of time spent cannot justify an exorbitant application for fees.

(c) Change of counsel and duplicative time. The Court will recall that counsel was changed by plaintiff on the eve of trial. Originally plaintiff was represented by Mr. Wasser but only days before the trial was originally scheduled to begin, and only six weeks before the trial actually commenced, the firm of Julien & Schlesinger, P.C. was retained to try the case. It is recognized that in such circumstances the time necessary to familiarize trial counsel with the case must be deducted by the Court in determining reasonable attorney fees. Michelman v. Clark-Schwebel Fiber Glass Corp., 1975-2 CCH Trade Cas. ¶60,551 (S.D.N.Y. 1971). Moreover, all duplicative time of Mr. Wasser and of trial counsel, once Julien & Schlesinger were retained, should be

deducted. Michelman, supra; City of Philadelphia v. Charles Pfizer & Co., 345 F. Supp. 454 (S.D.N.Y. 1972). Plaintiff's counsel have not shown why two law firms were necessary or what division of labor, if any, there was between them. Compare City of Philadelphia, supra, at 484.

In sum, it is clear that the $425,000 allowance requested by plaintiff's attorneys bears no relation to the permissible dimensions of a fee fixed pursuant to Section 4 of the Clayton Act for that portion of their services as produced a recovery for damages. The petition is fatally defective and offers no rational basis for the fixing of an award which can properly relate only to a minor fraction of the work which is recited. The burden rests with plaintiff's attorney to come forward with detailed substantiation for that portion of their claim which is properly allowable. Such substantiation to this time is totally lacking.

C. Fixing an Award for Costs.

In addition to the excess demand for attorneys' fees, the entire request for accountants' fees in the amount of $46,850 (which is said to have been expended in preparing a claim for damages (Wasser afft., pp. 6, 9)), must be disallowed as beyond the allowable "costs" fixed by 28 U.S.C. § 1920 and Rule 54(d) of the Federal Rules of Civil Procedure. Plaintiff may not recover as costs any amounts expended for

services rendered by accountants such as those identified at page 14 of the Fee Petition:

> "[T]he only costs recoverable by a successful plaintiff in a private antitrust suit are those which are normally allowable under 28 U.S.C. § 1920 and Rule 54(d), and such costs do not include accounting fees." Twentieth Century Fox Film Corp. v. Goldwyn, 238 F.2d 190, at 224 (9th Cir. 1964).

Regardless of the statutory limitation on costs, the time spent computing the amount of the wholesale incentive allowance claimed to have been improperly denied dealers selling crash parts to FLM would have to be excluded. As is set forth in defendants' post-trial brief, this time would have had to have been expended as a routine part of FLM's business operations (or of a franchised dealer) had defendant granted the allowance on sales of crash parts to plaintiff (see Defendant's Post-Trial Brief, pp. 92-93). It is simply an inherent cost of making a claim for wholesale incentive allowance, which reduces the net amount realized by the party receiving the allowance. If such expenses are to be taken into account they could only be treated as an offset to the amount of wholesale incentive allowance awarded as damages.

CONCLUSION

For the reasons stated, the Court should defer consideration of the petition for a fee award and defendants' attorneys should be given a fair opportunity to review any information now proffered by plaintiff's attorneys and to cross-examine the applicants regarding such information. In any event, the claim in the petition is vastly inflated, contains impermissible elements and must be reduced to a minor fraction of the amount claimed.

Dated: February 6, 1976

Respectfully sbumitted,

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William M. Dallas, Jr.

William A. Zolbert
Office of the General Counsel
Ford Motor Company

Of Counsel.

Affidavit of Robert MacCrate, Sworn to March 1, 1976, in Opposition to Petition For Attorneys' Fees and Costs

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FLM COLLISION PARTS, INC., Plaintiff, -against- FORD MOTOR COMPANY and FORD MARKETING CORPORATION, Defendants.	:	73 Civ. 713 (TPG) AFFIDAVIT IN OPPOSITION TO PETITION FOR ATTORNEYS' FEES AND COSTS

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT MacCRATE, being duly sworn, says:

1. This affidavit is submitted in opposition to the petition for attorneys' fees and costs filed by counsel for plaintiff. Defendant opposes the petition following the taking of the deposition of plaintiff's counsel, on each of the following grounds:

a. With respect to the claim for David L. Wasser, attorney and accountant:

(1) the number of hours claimed to have been spent for which attorneys' fees may be awarded

--are in the aggregate grossly inflated;

--appear to include all time spent on any matter for FLM Collision Parts, Inc., either as an attorney or as an accountant from October 1972 to February 6, 1976;

--are in substantial number arbitrarily assigned as "lawyer time" even though the work done was of a bookkeeping and accounting character;

--were to a substantial extent devoted to seeking injunctive relief in this action; and

--were to a substantial extent unrelated to the actual recovery for damages which the Court has indicated it would allow with respect to the wholesale incentive allowance.

(2) The claimed hourly rate of compensation is excessive in light of

--counsel's refusal and apparent inability to show that he has any established hourly rate which he customarily charges in such matters;

--the limited nature of the legal services actually rendered;

--the extensive reliance by counsel on other attorneys to do the work for him; and

--the level of hourly rates which courts have employed in other cases for the purpose of valuing legal services for the award of counsel's fees.

b. With respect to the claim for Julien & Schlesinger, P. C.:

(1) The number of hours claimed to have been spent for which attorneys' fees may be awarded

--are not documented by any time records maintained by the firm;

--were to a substantial extent duplicative of the time claimed to have been spent by David L. Wasser;

--were to a substantial extent unrelated to the actual recovery for damages which the Court has indicated it would allow with respect to the wholesale incentive allowance; and

--were in part devoted to seeking injunctive relief in this action.

(2) The claimed hourly rates are excessive in light of

--counsel's inability to show that they have any established hourly rates which they customarily charge in such matters; and

--the level of hourly rates which courts have employed in other cases in determining the amount of reasonable attorneys' fees.

2. Defendants acknowledge that attorneys' fees may be awarded pursuant to Clayton Act §4 (15 U.S.C. §15) when a recovery of damages is awarded for violation of the Robinson-Patman Act. Certain of the applicable principles as to the limits and measure of reasonable fees in such cases were set forth in defendants' memorandum submitted to the Court on February 6, 1976. Now, following the deposition of plaintiff's attorneys on February 13, 19 and 20, 1976, and their responses--to the limited extent made--to the subpoenas for their records, this affidavit sets forth the factual record relevant to the petition for attorneys' fees and costs. An accompanying supplemental memorandum sets forth the defendants' contentions regarding the application of the controlling legal principles to this factual record.

A. The Time Spent and Rate of Charge by David L. Wasser, Attorney and Accountant

3. In the petition of plaintiff's attorneys, Mr. Wasser claims that he spent 1277 hours as a lawyer and 365 hours as an accountant working in some connection with this case. (Petition, pp. 11, 13-14) In his affidavit

submitted with this petition, he divides his "lawyer time" spent prior to the retention of Julien & Schlesinger into three periods (the third of which extends into the period of joint trial preparation): Mr. Wasser claims to have spent 280 hours in what he refers to as the "pre-complaint period" (Wasser afft., p. 10), 335 hours in the period up to March 25, 1974 when he was seeking a preliminary injunction (ibid., pp. 10-11), and 409 hours, from March to September 1974 in "discovery and trial preparation" (ibid., p. 11). It appears that Mr. Wasser claims to have spent more than 800 hours of "lawyer time" on the matter before he retained Julien & Schlesinger.

4. After he retained Julien & Schlesinger, Mr. Wasser claims to have continued to devote substantial amounts of time to the matter and, specifically, during the trial of the case (September 23, 1974 to October 9, 1974), he claims to have spent 151 hours as an attorney (ibid., p. 11-12)--as well as 10 hours as an accountant (Wasser Exhibit 4). In contrast, Mr. Julien, plaintiff's chief trial counsel, claims to have spent 88 hours on the case during the same period, Mr. Schlesinger claims to have spent 96 hours and Mr. Jaroslawicz, who is identified as the one principally engaged in out of court preparation for plaintiff, claims to have spent 109 hours. (Schlesinger afft., pp. 13-14; Schlesinger deposition, p. 33)

Mr. Wasser's Refusal to Provide Relevant Information

5. Defendants have sought by subpoena of records and through Mr. Wasser's deposition to determine how Mr. Wasser accounted for his time on FLM matters, how he distinguished (if he did) between lawyer time and

accountant time, how he separated the time spent in routine auditing of FLM financial statements from the time spent preparing financial statements for use in this case, what portion of his time spent for FLM was devoted to matters unrelated to the actual recovery obtained by FLM in this action, and what portion of his time was devoted to efforts to obtain injunctive relief. However, on the advice of Julien & Schlesinger, who served as counsel to Mr. Wasser, both during his deposition and in connection with his response to the subpoena, Mr. Wasser refused to answer countless questions or to produce a number of relevant papers.

6. The questions which Mr. Wasser refused to answer are collected in Exhibit A to this affidavit and the subpoenaed material which Mr. Wasser has refused to produce is listed in Exhibit B to this affidavit. Moreover, from such diary entries as Mr. Wasser did produce, he withheld by redaction substantial portions of the information, claiming it to be "confidential", thereby increasing the difficulty of verifying the accuracy of his claims. For example, for the period March 8, 1974 to March 5, 1975 there are 67 separate redactions of relevant information denoted as "confidential". In addition, there are countless other redactions during this same period which may or may not be relevant since Mr. Wasser testified that not all relevant redactions were labeled "confidential" on the margin of the excised diaries supplied to defendants (Wasser deposition, p. 109).

7. Mr. Wasser's wholesale refusal to provide either his own verification or a means by which defendants could verify the fairness and accuracy of his claims would alone justify, we submit, the rejection of any claim by

Mr. Wasser for attorneys' fees. Nevertheless, defendants' attorneys have attempted to analyze such information as Mr. Wasser did provide and in the following paragraphs these facts are detailed together with the conclusions defendants urge the Court to draw regarding Mr. Wasser's portion of the claim for attorneys' fees and costs.

"Lawyer Time" v. "Accountant Time"

8. Mr. Wasser has been a certified public accountant since 1941 (Wasser afft., p. 7). He later attended New York Law School receiving his law degree in 1952 and was admitted to the bar in June 1954 (Wasser deposition, p. 17). He testified that he did not segregate his accounting time from his legal time: "the time listed for accounting work was included within my legal work and separated from my regular accounting. My diaries do not reflect these hours as accounting hours. They were part of my legal work" (Wasser depostion, p. 13). He added, however, that the time recorded in his diary did reflect some "regular accounting work" in addition to time spent on legal work on the case, as well as what Mr. Wasser described (without defining) as "special accounting work" (Id.).

9. Not only does Mr. Wasser's diary fail to differentiate time spent on accounting matters from time spent engaged in legal work on the case, but Mr. Wasser himself demonstrated in his deposition an utter inability to distinguish work done in his capacity as an accountant from work done as a lawyer. When questioned about the 365 hours claimed by him in his affidavit to have been spent "as an accountant" (afft., p. 9), Mr. Wasser initially testified that "the 365 hours was not spent as an accountant,

but merely refers to the hours listed on Exhibit 4, namely, legal work done in preparing exhibits and calculating damages, as a lawyer, to implement my legal notes" (Wasser deposition, p. 114). When asked what was meant by the term "accountant" as used with reference to his 365 hours claimed at page 12 of the Fee Application, he responded:

> "By the use of the word 'accountant' through that entire application, these hours in which I referred to myself as an accountant it was implied to mean the legal work done to calculate damages and prepare exhibits, not as an accountant but as an attorney with an accounting background, designed to save a greater number of legal hours that would have had to be performed by a lawyer who was not an accountant" (Wasser deposition, p. 116).

Later in his deposition, however, Mr. Wasser changed his position testifying that indeed he was claiming time spent in his capacity as a certified public accountant (Wasser deposition, pp. 145-147). He then stated:

> "Exhibit [4] represents the 365 hours of time that I spent as a CPA with a legal background in preparing exhibits and damage calculations for this case" (Wasser deposition, p. 147).

10. A further example of Mr. Wasser's inability to distinguish work performed by him as an acocuntant from work performed as a lawyer is reflected in his testimony regarding Wasser Exhibits 35 and 36. Wasser Exhibit 35 was a letter dated October 24, 1974 signed by Mr. Wasser and addressed to Mr. Julien which refers to three methods that were employed by Mr. Wasser in computing claimed lost wholesale incentive allowances. Wasser Exhibit 36 was an attachment to Exhibit 35 which contains computations based on these three methods of computation. Mr. Wasser first testified that these two documents were prepared by him "as an accountant having a special knowledge

of law and interpreting what is requested by the Court" (Wasser deposition, p. 169). A little later when asked in what capacity the calculations contained in Exhibit 36 were prepared, Mr. Wasser answered in the following manner:

> "It is my opinion it is done as a lawyer, whether or not I put them on [Exhibit 4--the enumeration of 365 hours], because I did not do the routine work, but the overall supervision and the checking and coordination and consolidation was at the top level. So I would say it was a combination of both, CPA with a specialized training" (Wasser deposition, p. 173).

11. The confusion of "lawyer time" and "accountant's time" serves only to confirm that no matter how a substantial portion of the time allegedly spent by Mr. Wasser is characterized, it must be excluded from any totalling of attorney's time which contributed to any recovery by plaintiff in this action. The only possibly relevant accounting work to be done was simply that which a Ford dealer routinely performs to claim wholesale incentive allowance. Neither an attorney's time nor an accountant's time ("having special knowledge of law") is in any way relevant to such routine claims filing with Ford. (In fact, the record indicates that such claims were prepared by Mr. McKee of FLM.)

Relationship with FLM and Refusal to Disclose Fee Arrangements

12. Mr. Wasser stated that since 1965 he has acted as an accountant and from time to time as a lawyer for FLM Collision Parts, Inc. ("FLM") and its principals (Wasser deposition, pp. 3-4).

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13. Mr. Wasser refused, however, to produce any documents setting forth or to give any testimony describing the nature of his fee arrangements with FLM as an accountant or lawyer, either in connection with this case or in general. Although it is stated in the petition (p. 8) that "plaintiff's counsel prosecuted this action on the basis of a contingency fee," counsel steadfastly maintained that they would provide no proof of that fact nor any information as to the relation between any such contingent arrangement and counsel's other arrangements with FLM. (Wasser deposition, pp. 11, 14, 41-43).

Lack of Antitrust Experience

14. The instant case is the first antitrust action with which Mr. Wasser has been associated which has gone to trial. At no previous time has he made an application for attorneys' fees in such a matter. (Wasser deposition, p. 41). Indeed, Mr. Wasser's involvement in antitrust matters has been very limited. Aside from this case, Mr. Wasser has been even remotely involved in only one other antitrust case which has entailed court proceedings, that being a pending antitrust action brought by the State of New Jersey alleging antitrust violations against approximately 200 defendants; two of which defendants are represented by Mr. Wasser in conjunction with New Jersey counsel (Wasser deposition, pp. 30-41).

Absence of an Established Hourly Rate for the Services Involved

15. Mr. Wasser refused to testify regarding his fee arrangements in any other antitrust matters, which would have had a direct bearing on his claimed hourly rate in the instant case. When shown Wasser Exhibit 20,

a purported fee statement in another antitrust case, Mr. Wasser refused, on the advice of counsel, to describe the nature of the proceeding to which the document related, to testify whether the same stated hourly rate applied in other antitrust cases or whether the fee statement had in fact been paid (Wasser deposition, pp. 38-39).

16. As a result of Mr. Wasser's refusal to allow inquiry into his actual fee arrangements in any other antitrust cases, there is no evidence of what Mr. Wasser has been paid for any antitrust advice or services that he may have rendered and no credible basis on which to conclude that he had an established hourly rate of $100 for his work in such matters.

Hours Claimed for "Pre-Complaint Period"

17. During the "pre-complaint period" extending from October 1972 to February 1973, Mr. Wasser asserts that he had innumerable conversations with representatives of the Federal Trade Commission while attempting to interest the Commission in instituting proceedings. He includes all of this time in that for which plaintiff claims attorneys' fees (Wasser afft., p. 10). For example, Mr. Wasser includes in time spent during this period one day devoted to a trip to Washington for which he claims 16 hours (Wasser diary, January 23, 1973).

18. In view of Mr. Wasser's refusal to document any of his claimed legal research or other work allegedly done in preparation of the complaint, it is not possible to segregate any specific time as having been devoted to that portion of the case on which the Court proposes to allow a recovery. However, some insight as to the manner of his preparation is gained from the fact that ten days

before filing the complaint in this action, he spent 3 1/2 hours examining pleadings in a variety of antitrust actions in the files of this Court and made copies of various of these pleadings (Wasser deposition, p. 53). Thereafter, the complaint was filed on February 15, 1973 containing, without specification, a wide variety of antitrust claims including alleged violations of Sections 1 and 2 of the Sherman Act and Sections 2(a), 2(f), 3, 4 and 7 of the Clayton Act (Complaint, ¶20).

19. The boilerplate and indiscriminate character of the charges made in the complaint, and subsequently argued in support of the motion for a preliminary injunction, alleged without regard for the total absence of factual support, throw substantial doubt upon the claim that 280 hours were spent in the pre-complaint period which can in any way be related to the recovery which the Court has now indicated it would award to plaintiff.

20. There is no way that one can tell from the information provided by Mr. Wasser what time he spent in connection with researching or developing the claim under the Robinson-Patman Act on which the Court is awarding damages to plaintiff. The "tapes" provided to defendants which list numbers purportedly representing hours spent by Mr. Wasser on this case do not show time spent researching the Robinson-Patman Act (Wasser deposition, pp. 74-75) and Mr. Wasser has refused to produce any documents prepared by him which might reflect his alleged research endeavors on the Robinson-Patman Act (Wasser deposition, pp. 7-11, 75). In view of these obstacles to verification of the nature of Mr. Wasser's work and the cursory manner

in which the complaint alleges a violation of the Robinson-Patman Act, defendants contend that the Court should allow no more than ten hours of lawyer's time for the pre-complaint period. This would have been ample time to conclude such work regarding the Robinson-Patman Act as its citation in the complaint suggests and to prepare such allegations of facts as are relevant to such a claim.

Hours Claimed for Period from "Complaint to Withdrawal of Preliminary Injunction"

21. In his affidavit of January 26, 1976 under the heading, "Complaint to Withdrawal of Preliminary Injunction," Mr. Wasser commences his description with the statement that "On May 21, 1973 plaintiff moved for a preliminary injunction . . ." and he proceeds to claim that working as a lawyer for FLM he spent 335 hours, for which plaintiff seeks an award, during the period up to March 24, 1974 when Mr. Wasser withdrew his application for a preliminary injunction (Wasser afft., pp. 10-11). Again, there is no way that one can tell from the information provided by Mr. Wasser just what portion of this time was spent in connection with the claim under the Robinson-Patman Act on which the Court is awarding damages to plaintiff; but an examination of plaintiff's preliminary injunction papers shows that only a nominal number of hours spent during this period could have had any possible relation to a recovery on the Robinson-Patman claim for damages.

22. Commencing on May 14, 1973 and continuing over the next ten months until March 24, 1974, Mr. Wasser submitted various papers in support of an application for a preliminary injunction including the following:

--May 14, 1973, Notice of Motion and one-page

Affidavit of Stephen McKee, Secretary-Treasurer of plaintiff (Wasser Exhibit 11);

--August 24, 1973, further one-page Affidavit of Stephen McKee and Memorandum of Law in Support of Motion for a Preliminary Injunction (Wasser Exhibits 21, 22 and 23);

--September 4, 1973, Wasser letter regarding status of motion for a preliminary injunction (Wasser Exhibit 24);

--October 1, 1973, Plaintiff's Memorandum in Reply to Defendants' Memorandum in Opposition to Plaintiff's Motion for a Preliminary Injunction (Wasser Exhibit 25);

--October 26, 1973, Plaintiff's Memorandum in Reply to Defendants' Second Memorandum Opposing Plaintiff's Motion for a Preliminary Injunction (Wasser Exhibit 26);

--February 25, 1974, Additional Memorandum and Updated Financial Statements of Plaintiff in Support of Plaintiff's Motion for a Preliminary Injunction (Wasser Exhibit 27);

--March 6, 1974, Wasser letter to the Court submitting additional copies of documents in support of plaintiff's motion for a preliminary injunction (Wasser Exhibit 28).

23. Although the papers identified in paragraph 22 show on their face that they were prepared and submitted by Mr. Wasser in support of plaintiff's motion for a preliminary injunction, Mr. Wasser testified that only 30 hours of the 335 hours of "lawyer time" which he claims

to have spent during this period related to seeking a preliminary injunction (Wasser deposition, p. 58). Instead, he asserted that the balance of the time related to seeking a permanent injunction in the action (Wasser deposition, pp. 59-61). Whether the time spent was for a "preliminary injunction" (as the papers recited) or for a "permanent injunction" (as Mr. Wasser now contends) is immaterial. In neither case is such time relevant to a claim for counsel's fees under Clayton Act §4 (15 U.S.C. §15) with respect to an antitrust claim for damages.

24. While Mr. Wasser has made virtually no showing of any time spent during 1973, following the filing of the complaint, and in 1974, up to the abandonment of his application for a preliminary injunction, which would properly be included in a claim for counsel's fees under Clayton Act §4 (15 U.S.C. §15), defendants recognize that during this period Mr. Wasser did perform some general administrative work with respect to the prosecution of the action for which attorneys' fees might properly be claimed. For example, during this period defendants' counsel obtained an inspection of plaintiff's books and records which necessarily took a certain amount of Mr. Wasser's time. For these various hours spent in the handling of administrative matters pertaining to the general prosecution of the case, defendants suggest that the Court might properly allow 15 to 20 hours of Mr. Wasser's time from this 1973-1974 period in determining an amount of recoverable attorneys' fees.

Hours Claimed for "Discovery and Trial Preparation" and for "Trial"

25. Mr. Wasser claims to have spent 409 hours in "discovery and trial preparation" from late March 1974 to late September 1974, but aside from serving upon defendants a set of interrogatories on March 20, 1974 and a notice to take the deposition of Mr. Rowlands dated July 8, 1974 (Wasser Exhibit 15), no discovery or discernible trial preparation was accomplished by Mr. Wasser. His abortive attempt at proposed findings and conclusions dated July 5, 1974 (Wasser Exhibit 13) were entirely superceded by Julien & Schlesinger and the two depositions of Mr. Rowlands and Mr. Rose taken in early September 1974 were similarly conducted by Julien & Schlesinger.

26. Moreover, prior to retaining Julien & Schlesinger, Mr. Wasser sought and received the assistance of several other attorneys during this period (and in the immediately prior period) which further compounds the difficulty of ascertaining the amount and nature of the work actually performed by Mr. Wasser. He acknowledged that he conferred with Lewis Stackell, Esq. (with whom he shared office space until July 1974) as early as May 30, 1973 (Wasser deposition, pp. 19-21), and on various other unspecified occasions, and that he obtained unspecified assistance in the prosecution of this action from Mr. Stackell right up to July 1974 (Id.). In fact, Mr. Stackell's name appeared as of counsel on various court papers filed in this action in July 1974 (Wasser Exhibits 13 and 15).

27. Mr. Wasser refused, however, to state whether any work performed by Mr. Stackell was incorporated in papers filed in this case or whether Mr. Stackell is to share with him in any fee Mr. Wasser may be paid (Wasser deposition, pp. 67-68 and 95).

28. Moreover, Mr. Wasser also acknowledged that he had an arrangement for assistance in this case with Herbert Stuhl, Esq., of a concern identified as the New York Institute of Legal Research (Wasser deposition, pp. 23-24). However, Mr. Wasser refused to describe that arrangement or to answer any questions regarding just what assistance he obtained from Mr. Stuhl, other than to state that Mr. Stuhl had prepared various research materials for Mr. Wasser in connection with this case (Wasser deposition, pp. 24, 95).

Retention of Other Lawyers as Trial Counsel

29. The trial of this action was originally set by this Court for April 1, 1974, but the record confirms that Mr. Wasser was neither equipped nor prepared to try the case at that time or at any other time. The trial date was thereafter successively postponed at plaintiff's request to June 17, August 28 and, finally, to September 23, 1974.

30. Mr. Wasser's affidavit stated that Julien & Schlesinger, P. C., were retained by him in July 1974 as "trial counsel" in this action (Wasser afft., p. 5). Mr. Wasser refused to disclose any information or to answer any questions regarding the terms on which they were retained, the arrangements for sharing of fees, for sharing of expenses, for sharing of labor or for sharing of responsibility (Wasser deposition, pp. 76-77).

31. By retaining Julien & Schlesinger, Mr. Wasser seems to have acknowledged his lack of qualification to serve as trial counsel. In his affidavit, Mr. Schlesinger confirms this fact, stating: "At the time your deponent's firm was retained, this action was not ready for trial. There had been no depositions taken of the defendants and the plaintiff's case was not ready to proceed." (Schlesinger afft., p. 5).

32. Mr. Wasser states in his affidavit that in preparing for trial and during trial he had "the primary responsibility for calculating damages suffered by the plaintiff as a result of the defendants' violations of the antitrust laws" (Wasser afft., p. 6). He goes on to state that "it was a time-consuming and difficult job" to calculate damages in this action which "required 365 hours" "of his time as an accountant" and 138 hours of other certified accountants to perform (ibid., pp. 6, 9).

33. Nonetheless, Mr. Wasser claims as "lawyer time" substantially all of the hours which he says he spent for FLM during the period from the retention of Julien & Schlesinger to the end of the trial. Between July 1, 1974 and October 15, 1974, he claimed to have spent only 10 hours of time in accounting work related to the case (Wasser Exhibit 4).

34. It has been pointed out in defendants' memorandum that accountants' time is not a recoverable cost (Memorandum in Response to Plaintiff's Petition, p. 12). Where, as here, the accountant is also of counsel, the lawyer-accountant cannot be permitted through the device of merging his accounting activities into his legal activities to recover as taxable attorneys' fees the time spent as an accountant.

35. The following memoranda were submitted by plaintiff's counsel in connection with the trial and for each is indicated the date of its submission, the total number of pages and the portion pertaining to plaintiff's Robinson-Patman Act claim:

--August 21, 1974, Plaintiff's Pretrial Memorandum of Law, 18 pages (Robinson-Patman Act, pp. 13-17) (Wasser Exhibit 16);

--September 23, 1974, Plaintiff's Pretrial Reply Memorandum of Law, 9 pages (no Robinson-Patman Act material) (Wasser Exhibit 18);

--September 25, 1974, Plaintiff's Trial Memorandum, 9 pages (Memorandum relating generally to damages and injunctive relief) (Wasser Exhibit 19);

--September 30, 1974, Plaintiff's Additional Trial Memorandum, 7 pages (no Robinson-Patman Act material) (Wasser Exhibit 29);

--September 30, 1974, Plaintiff's Supplemental Trial Brief, 14 pages (no Robinson-Patman Act material) (Wasser Exhibit 30).

36. While Mr. Wasser testified that after the Court's admonition in March 1974 for the parties to give greater attention to the Robinson-Patman Act he devoted 90 percent of his research time to this issue (Wasser deposition, pp. 74-75), he produced no evidence of any such research by him and the abbreviated treatment of Robinson-Patman matters in the memoranda listed in paragraph 34 belies any significant contribution by him on this point.

37. In addition, aside from addenda containing statistical exhibits, Mr. Wasser was unable to identify any portions of the memoranda listed in paragraph 35 which reflected substantially his work, nor was he able to state how much time he spent working on these memoranda (Wasser deposition, pp. 123, 129, 131, 136-137).

38. Mr. Wasser took responsibility for having prepared the following statistical exhibits which were used at the trial:

Plaintiff's Exhibit 106 (Wasser Exhibit 31)

1(a). Wholesale Incentive Credits Removal

1(b). Obsolescence Credits Denied

1(c). Stock Order Discounts Denied

1(d). Increase of Premium Paid to Dealers

1(e). Loss of Goodwill

2. Loss of Stock Order Discounts

3. Loss Due to Inability to Purchase Direct

4. Attorney Fees and Costs

Plaintiff's Exhibit 106A (Wasser Exhibit 33)

(Restated Version of 106)

Plaintiff's Exhibit 107 (Wasser Exhibit 32)

5. Loss of Profit Due to Growth Interruption.

39. It will be noted that, with the exception of item 1(a) of Plaintiff's Exhibits 106 and 107, all of the exhibits referred to in paragraph 38 pertain to various theories of damages which the Court has indicated it is rejecting. Even item 1(a), which pertains to the wholesale incentive allowance, was found to be inadequate to

support a recovery and most of the computations have had to be redone after the Court's decision in December 1975. Thus, the total contribution towards any ultimate recovery by plaintiff in this action of Mr. Wasser's statistical work, prepared before and during the trial, is virtually nil.

40. Mr. Wasser's claim for 409 hours spent after March 1974 in "discovery and trial preparation" (supra, paragraph 25) has not been shown to have made any significant contribution to plaintiff's recovery. Defendants submit that an allowance for time spent during this period of 25 hours would be a generous one for any conceivably relevant and non-duplicative time.

41. For the period of the trial Mr. Wasser claims that he spent, as noted earlier, 151 hours working as a lawyer for FLM and an additional 10 hours as an accountant, for all of which he seeks an award. It is clear that there is no way that one can tell from the information provided by him just what portion of this time was spent as an attorney or what portion was spent in connection with any claim under the Robinson-Patman Act. The available information suggests that it was in fact unnecessary for Mr. Wasser to render any lawyer services at the trial of this case on behalf of plaintiff and that such "lawyer time" as he spent was duplicative of time spent by the Julien & Schlesinger lawyers as trial attorneys. Accordingly, even if the lack of any contribution to the plaintiff's recovery on the Robinson-Patman claim were to be disregarded, defendants contend that no recovery should be allowed for time spent during the period of the trial as a charge against defendants under

Clayton Act §4 (15 U.S.C. §15). This conclusion is further reinforced by the fact that Mr. Wasser appeared at the trial as a witness, a role that is customarily foreclosed to trial counsel under the Code of Professional Responsibility.

Hours Claimed for the "Post-Trial" Period

41. For the period since the trial was adjourned in October 1974, Mr. Wasser claims to have spent 102 hours as an attorney. With respect to the post-trial brief prepared on behalf of the plaintiff, Mr. Wasser is unable to identify any portion of the main body of the brief which substantially reflects his work (Wasser deposition, pp. 159-160), nor is he able to state how much time he spent participating in the preparation of the brief (Wasser deposition, p. 162).

42. Significantly, Mr. Wasser's affidavit describes his work during this period as directed towards preparing various "damage figures" (Wasser afft., p. 12). In particular, Mr. Wasser states in his affidavit that "your deponent has expended a substantial amount of time in updating the damage sustained by the plaintiff and preparing those damages in the form requested by the Court as to those damages which the Court indicated it would permit the plaintiff to recover" (Wasser afft., p. 13).

43. Moreover, Mr. Wasser testified that the statistical exhibits prepared by him for use at the recent hearing on damages (Wasser Exhibit 37A [Plaintiff's Exhibit 1000] and Wasser Exhibit 38) were prepared by him in his capacity both as a lawyer and as an accountant and that

he has no segregation of the time spent in this dual capacity in his diary (Wasser deposition, pp. 177-178)

44. In view of the bookkeeping and accounting character of the work described by Mr. Wasser which has been undertaken during the post-trial period and his inability to segregate any time which could reasonably be classified as "lawyer time", we submit that no award should be made for work done by Mr. Wasser during this period.

Claim for Costs

45. In addition to seeking an award for attorneys' fees payable to Mr. Wasser, plaintiff is also claiming certain amounts as "costs" incurred by Mr. Wasser in the rendering of accounting services by himself, an assistant and two other certified public accountants and for the "paralegal" services of his wife and daughter.

46. As noted in paragraph 34, amounts expended for accounting services are not taxable items of cost. Moreover, the amounts claimed by Mr. Wasser as costs for both accounting and paralegal services are not actual out-of-pocket expenses, but instead reflect a gross inflation of up to 5 times the amounts actually expended by him in payment for these services (Wasser deposition, pp. 46-50).

47. For the services of the two other certified public accountants (Messrs. Brand and Israel), Mr. Wasser compensated them at the rate of $15 an hour but is claiming their services as a "cost" at the rate of $75 an hour (Wasser deposition, pp. 49-50). For the services of his accounting assistant (Tony Basil), Mr. Wasser paid $8.00 an hour and is claiming at the rate of $15 an hour (Wasser

deposition, pp. 49-50). Likewise, for the paralegal services of his wife and daughter, Mr. Wasser is claiming at the rate of $15 an hour, having paid them only $10 an hour and $3.00 an hour respectively (Wasser deposition, pp. 49-50).

48. Defendants contend that there should be no award of costs for accounting services and that if any paralegal services could be related to the Robinson-Patman Act recovery, any award would have to be limited to verified out-of-pocket expense by Mr. Wasser.

B. The Time Spent and Rate of Charge by Julien & Schlesinger, P. C.

49. Since July 30, 1974 when Julien & Schlesinger, P. C., state that they were retained in this action, they claim to have spent up to February 9, 1976 an aggregate total of 933 hours (Wasser Exhibit 34). However, at the hearing on February 9, 1976, Mr. Julien acknowledged that the firm kept no time records (Tr. 76). The only records of work done which Julien & Schlesinger produced in response to the subpoena served on February 4, 1976, were a small number of pages from appointment books which contained assorted notations by Messrs. Julien, Schlesinger and Jaroslawicz (Schlesinger Exhibits 2, 3, 4 and 5). Mr. Schlesinger acknowledged that these documents did not indicate specific hours spent on the case except on a few pages where it was noted that the entire day was spent by unidentified individuals on the case (Schlesinger deposition, p. 11).

50. Notwithstanding this virtually complete absence of any contemporaneous record, Julien & Schlesinger, some 15 to 18 months after the events, have drawn up a purported statement of hours spent (Wasser Exhibit 34). In his deposition, Mr. Schlesinger testified regarding the manner in which the hours were calculated:

> "We are relying upon the events that transpired, the exact date that they transpired, and all the written memoranda done for the court and for our adversary and our diaries to come up with these conservative estimates of hours, because quite frankly, we spent a lot more hours on this, since we don't diary our hours that precisely, so that Ford Motor Company gets the benefit of it" (Schlesinger deposition, p. 15).

51. While Mr. Wasser seeks to take credit for a substantial number of hours spent on legal research the fruit of which he asserts he turned over to Julien & Schlesinger, Mr. Schlesinger testified that these materials principally consisted of photostats of cases and some handwritten notes and that "very little" time was required by Julien & Schlesinger to review them (Schlesinger deposition, pp. 28-29).

52. The information provided defendants indicates, however, that to a substantial extent the time claimed by Mr. Wasser and by Julien & Schlesinger to have been spent on legal research was substantially duplicative. For example, the time claimed by Julien & Schlesinger for the period immediately after their retention was spent reviewing the file and the sundry material prepared by Mr. Wasser (Schlesinger deposition, p. 29). In addition, substantial duplication of effort went into the preparation of the pretrial memorandum of law (Wasser Exhibit 16). Mr. Wasser testified that he prepared a draft pretrial memorandum which he submitted for review by Julien & Schlesinger (Wasser deposition, pp. 117-118) and his diary

indicates that Julien & Schlesinger independently were preparing a similar memorandum for review by Mr. Wasser (Wasser deposition, p. 119). Mr. Schlesinger testified as to the nature of this review:

> "The review dealt with reviewing basically new material that we were putting into our pre-trial memorandum. This review between Mr. Julien, Mr. Jaroslawicz and myself, and I am sure Mr. Wasser participated, where we would review drafts of our pre-trial, because we certainly didn't do it in final form immediately; we would review material that was new to the material given to us by Mr. Wasser" (Schlesinger deposition, p. 31).

53. With regard to the pretrial memorandum as well as the other memoranda listed above in paragraph 35, Mr. Schlesinger testified that Mr. Jaroslawicz "would read every case, every law review article that we all thought appropriate at the time" then Mr. Jaroslawicz "would collate what he thought were the important ones, give them to both Mr. Julien and I; we would read them, we would read the stuff independent of him, perhaps text[s] on the subject, and Mr. Julien would review other texts on the subject, and we would all pool our drafts" (Schlesinger deposition, p. 33). It is thus apparent that substantial duplication of time and effort occurred even within the firm of Julien & Schlesinger in the preparation of these memoranda.

54. Moreover, four of the five memoranda prepared for the trial (see supra, paragraph 35) address issues other than the Robinson-Patman Act, the sole basis upon which the Court is awarding damages, and therefore the time expended on these memoranda (Wasser Exhibits 18, 19, 29 and 30) should be entirely excluded from the Court's consideration. In view of Mr. Schlesinger's testimony that Mr. Jaroslawicz devoted most of his time during the trial to preparing these memoranda, all of Mr. Jaroslawicz's

time claimed to have been spent preparing the reply memorandum (16 hours) and for the period September 23 to September 30 (60 hours), during which time Wasser Exhibits 19, 29 and 30 were prepared, should be excluded. So, too, time spent by Mr. Julien (2 hours) and by Mr. Schlesinger (7 hours) on the reply memorandum should be excluded. In addition, at least two-thirds of Mr. Schlesinger's time claimed to have been spent during the period September 23 to September 30, 1974 (i.e., 30 hours) should be excluded in view of his testimony that he provided substantial assistance in the preparation of the memoranda submitted during this period.

55. The remaining memorandum prepared for the trial (Wasser Exhibit 16) contains substantial portions which pertain to Sherman Act Section 1 and 2 claims which the Court specifically rejected. The time claimed to have been spent on this memorandum (41 hours by Mr. Jaroslawicz, 12 hours by Mr. Schlesinger and 8 hours by Mr. Julien) (Wasser Exhibit 34; Schlesinger deposition, pp. 34, 36-37) accordingly should be substantially reduced in any determination of attorney's time. In view of Mr. Schlesinger's lack of any recollection of the amount of time spent on the two Sherman Act issues (Schlesinger deposition, p. 39), we submit that the most objective method of adjustment would be to reduce the claim for time spent on the memorandum by the ratio the number of pages addressed to these issues bear to the total number of pages of the memorandum which would be a reduction of approximately 50 percent. This would mean that 20 of the hours claimed by Mr. Jaroslawicz, 6 of the hours claimed by Mr. Schlesinger and 4 of the hours claimed by Mr. Julien for work on this memorandum should be excluded.

56. A reduction in the amount of time claimed for preparing the post-trial brief (Wasser Exhibit 37) should also be made for the reasons set forth above in paragraph 55 as well as because most of the damage theories set forth in this brief have similarly been rejected by the Court. Although Mr. Schlesinger claims that the time spent on the portions pertaining to the Sherman Act claims was "minimum" (Schlesinger deposition, pp. 57-59), he has no recollection of the amount of time spent nor does he have any recollection of time spent on the claim for damages (Schlesinger deposition, p. 60). Thus we would urge the Court to apply a similar apportionment of time by pages of text as suggested in paragraph 55, thereby reducing the time claimed by approximately 45 percent. Based on Wasser Exhibit 34, this would mean that 40 hours claimed by Mr. Jaroslawicz, 28 hours claimed by Mr. Schlesinger and 12 hours claimed by Mr. Julien for work on the post-trial brief should be excluded.

57. A further problem in awarding attorneys' fees to Julien & Schlesinger is raised by their persistent refusal and apparent inability to produce any documents or give any testimony setting forth an hourly rate customarily charged in similar cases by their firm or by the individual attorneys involved in this case (Schlesinger deposition, pp. 18-20). Mr. Julien maintains that the firm does not have any customary hourly rate for its legal services. This was confirmed by Mr. Jaroslawicz when he represented at Mr. Schlesinger's deposition that:

> "We maintain no written list saying if you come in here with a securities case you would be charged . . . $500 an hour.

"It depends on the issues involved, whether or not we feel it will settle or go to trial, and then we establish a rate for our work (Schlesinger deposition, p. 19)."

58. The failure of Julien & Schlesinger to maintain adequate records of time spent despite repeated admonitions by the Second Circuit Court of Appeals to the Bar to do so, their inability to recall the amount of time spent in connection with the Robinson-Patman Act claim and their refusal to provide any information regarding their billing rates, justify, we urge, a reduction of at least 30 percent in the amount of hours claimed to have been spent (which approximates the percentage of Julien & Schlesinger's time which appears to have no relation to time spent in Court, upon deposition or upon identifiable memoranda) as well as a reduction in the rates sought to be charged for these hours to conform with rates allowed in similar actions.

C. Conclusion

The statutory provision for counsel's fees under Clayton Act §4 (15 U.S.C. §15) is limited to fees for legal services that contributed to specific recovery by the plaintiff. The burden rests with plaintiff to demonstrate the time spent on relevant work and the customary rate charged for such work. Plaintiff's demonstration has been seriously deficient but viewed in its most favorable light we urge that the Court limit any award of attorneys' fees and costs

A. With respect to Mr. Wasser, to 55 hours for time spent (pre-complaint, up to March 1974 and March to September 1974) at an hourly rate not to exceed $50. an hour;

B. With respect to Julien & Schlesinger, to 175 hours for Mr. Julien at an hourly rate not to exceed $100 an hour, to 140 hours for Mr. Schlesinger at an hourly rate not to exceed $65 an hour, and to 160 hours for Mr. Jaroslawicz at an hourly rate not to exceed $40 an hour;

C. With respect to costs, to the $1,300.90 in costs enumerated on page 14 of the petition.

Robert MacCrate

Sworn to before me this
1st day of March 1976

GEORGE A. SCHELL
Notary Public, State of New York
Residing in Nassau County
Nassau Co. Clk's No. 30-3026250
Certificate filed in
New York Co. Clk's Office
Commission Expires March 30, 1977

EXHIBIT A

A Yes.

Q What documents are there?

A Confidential working files on the case.

Q Could you describe for us the content of those confidential working files?

A Oh, research into cases with notations as to the application to my client's case.

Q Are these memoranda of law or are they just jottings?

A They are a combination.

Q Are the memoranda of law memoranda prepared by you or were they prepared by other lawyers?

A By me.

Q Can you identify the subject matter of any of those memoranda?

MR. SCHLESINGER: I object. I think that's getting to the area that we consider to be privileged and really unnecessary for this deposition, in fixing the hours that Mr. Wasser spent on this case.

MR. MacCRATE: I object to that restriction on interrogation as making meaningless mention of hours without an opportunity to examine the witness as to the

actual work product of the hours spent.

Are you going to insist upon your direction to the witness not to answer?

MR. SCHLESINGER: Well, I am going to insist not answering on those documents.

As far as his working hours and what he used those hours for, I think he is prepared to testify to that. And these documents are of no assistance in that area.

Q Mr. Wasser, with respect to the memoranda of law to which you refer, do these memoranda contain the results of your legal research?

A Yes.

Q Can you identify for us the subject matter of any of those memoranda?

MR. SCHLESINGER: Again, I am going to object. I think Mr. Wasser has indicated that there are some types of his own notes and some types of memos that he prepared himself based on his evaluation of cases and its applicability to his client's position. That type of information I say is privileged and has no bearing on the hours spent on this case.

Whatever hours were spent is itemized

in his diary and he is prepared to tell you how he has divided those hours up. That's the real issue.

MR. MacCRATE: You are instructing the witness not to answer, Mr. Schlesinger?

MR. SCHLESINGER: Yes, I do.

Q Are you going to follow Mr. Schlesinger's direction in that respect, Mr. Wasser?

A Yes.

Q Referring to Specification 6 of Exhibit A of Wasser Exhibit 3, the subpoena, which reads, "Any retainer agreement or other document, including but not limited to, all fee statements reflecting any compensation arrangement between FLM Collision Parts, Inc. and/or either of its pricipals and David Wasser, Esq., with respect to any legal services thereto and with respect to any legal services rendered in relation to the above-entitled action," have you produced any materials in response to that item?

MR. SCHLESINGER: I object. And we are not going to produce any materials in respect to that item because we feel that our position is that these are again privileged, have absolutely no weight on determination by

the court of our attorneys' fees, that costs include attorneys' fees and that the court has to award us attorneys' fees and costs based on existing statutes and law, case law.

MR. MacCRATE: I suggest you reserve argument for the court, we will get on much quicker.

MR. SCHLESINGER: I just want my position on the record.

BY MR. MacCRATE:

Q With respect to Specification 7, which reads, "Any agreement between David L. Wasser, Esq. and Julien & Schlesinger, P.C. with respect to compensation of counsel, sharing of fees and/or payment of expenses in connection with the above-entitled action," have you produced any material in response to that item?

MR. SCHLESINGER: We have again instructed Mr. Wasser not to produce any of that material for the same reasons concerning retainers between Wasser and FLM.

Q Mr. Wasser, with respect to Specification 8, which reads, "Diaries, times sheets, blotter entries

produced any of those statements in response to the subpoena?

A I do not keep copies of these statements sent out.

Q When the payment for these fee statements is received, does the fee statement come back to you at that time?

A No.

Q What record do you have of the fees that you receive in response to these statements which you send out, of which you do not retain a copy?

A I have an index card.

Q What does the index card show upon it?

A The monthly accounting bill and the amount received and the date of receipt.

Q In response to Specification 10, have you produced such index card or cards for FLM Collision Parts, Inc. and for either of its principals?

MR. SCHLESINGER: No. Again, there is information on those cards which we consider to be privileged and irrelevant, unnecessary to determine the costs allocated in this matter.

MR. MacCRATE: Do I understand you have refused to allow Mr. Wasser to produce anything

in response to the subpoena from among these index cards?

MR. SCHLESINGER: Yes.

Q Mr. Wasser, you were certified as a public accountant in 1941; is that correct?

A Yes.

Q And you thereafter received your law degree in 1952?

A Right.

Q Subsequently you were admitted to the bar?

A Yes.

Q When were you first admitted to the bar?

A I believe it was in June 1954.

Q In what States were you admitted to the bar?

A New York State.

Q So from 1941 to 1954, June of 1954, you were engaged in the practice of accountancy; is that correct?

A For part of the time.

Q Did you have a Service experience that interrupted that?

A Yes.

Q Since your admission to the bar in June

other lawyers?

A Yes, a flexible arrangement.

Q Do you share your accounting practice with other accountants?

A No.

Q Do you share your law practice with other lawyers?

A Yes.

Q With what other lawyers are you associated in practice?

MR. SCHLESINGER: I am going to object. It is completely irrelevant.

Q Do you refuse to answer the question, Mr. Wasser?

A Yes.

Q Is Mr. Stackell one of the lawyers with whom you share offices?

MR. SCHLESINGER: Objection.

MR. MacCRATE: Do you instruct the witness not to answer?

MR. SCHLESINGER: Yes.

Q Mr. Wasser, I show you such portion of a page from your record dated May 30, 1973 as has been furnished to us, and ask you to read into the record the

THE WITNESS: Off the record.

MR. MacCRATE: No, please, on the record.

A All right. On the record.

I have the minutes, certain minutes and hours noted, and research, those three lines, 45 minutes, an hour and 45 minutes, and "res. 3-0."

Q What does "res. 3-0" mean?

A Research, three hours.

Q Mr. Wasser, who is the gentleman to whom you refer in that notation?

A He is associated with the New York Institute of Research and I had consulted with him.

Q During what period of time did you consult with -- is it Mr. Stuhl?

A S-t-u-h-l.

Q -- Mr. Stuhl?

A It was for a short period of time in the middle of '74, but I do not recall the exact period of time.

Q Can you, by reference to your record, determine whether the conference on June 10 was or was not the first conference you had with Mr. Stuhl?

A I don't recall.

Q What work did Mr. Stuhl do for you with

respect to the FLM matter?

A He took some of my research notes, a large number of my research notes --

MR. SCHLESINGER: I object to what work Mr. Stuhl did. If you want to know how Mr. Wasser spent his time at that particular conference or those notes and what he worked on at that time, fine. We are not charging for Mr. Stuhl's work or asking for work reimbursement for Mr. Stuhl.

MR. MacCRATE: Have you finished, Mr. Schlesinger?

MR. SCHLESINGER: Yes.

Q Would you continue your answer?

MR. SCHLESINGER: No, I instruct him not to answer.

Q Are you going to follow Mr. Schlesinger's instructions and not tell me anything further about what you did with Mr. Stuhl?

MR. SCHLESINGER: I did not object to that. I do not object to what Mr. Wasser did. But I object to what work Mr. Stuhl did. I say, it is of no importance and it has no bearing on our application for costs, including

attorneys' costs.

MR. MacCRATE: It obviously bears directly to the work that Mr. Wasser did or did not do. And if you are going to insist on this, it is going to require bothering the court to seek a ruling.

MR. SCHLESINGER: I am not preventing you from asking what he, Mr. Wasser, did and how many hours he spent doing what he did.

MR. MacCRATE: Are you saying that I may not inquire as to what Mr. Stuhl did for Mr. Wasser; is that your instruction?

MR. SCHLESINGER: That is correct.

Q And you, Mr. Wasser, are going to follow Mr. Schlesinger's instruction in that regard?

A Yes.

Q Mr. Wasser, I show you such portion of the entry in your record for June 24, 1974 as you have produced to us, and ask you to read what appears opposite "FLM v. Ford."

A "FLM v. Ford, tel. call to clients on status of case and realignment of procedure. See notes."

Then the second line -- pardon me, above the "See notes," there was something cut out. That might

have been 15 minutes. I believe it was 15 minutes.

The second line is, "Call Wash.," meaning Washington, "202-962-3750, R. Fleishman, no answer."

In the third line, "Called H. Stuhl, 421-1800, re: His report, should be geared to proposed statement of fact and conclusion of law."

Then in the right-hand side, "Have continued on research, 6 hours" -- "6-0."

Q Was Mr. Stuhl at that time engaged in the preparation of a proposed statement of fact and conclusion of law?

MR. SCHLESINGER: I object and instruct him not to answer.

Q Was Mr. Stuhl at that time assisting you in the preparation of this case for trial, Mr. Wasser?

MR. SCHLESINGER: Objection.

MR. MacCRATE: Are you instructing the witness not to answer?

MR. SCHLESINGER: Yes.

Q Mr. Wasser, from your record for July 2, 1974, I show you such portion of that entry as you have exhibited to us and ask you to read it into the record, please.

A There is a note on the left-hand side "Called" --

Q During the period 1972 to date, what portion of your professional time have you devoted to tax matters, Mr. Wasser?

A I haven't kept a record.

Q Can you approximate the time or the portion of your time spent in tax matters?

MR. SCHLESINGER: I am going to object. Again, his general practice or working knowledge I allowed him to answer, what areas he gets involved in. But the issue here is what he did in this particular case, how many hours he spent and what did he do, how he spent his time.

MR. MacCRATE: You are instructing Mr. Wasser not to answer?

MR. SCHLESINGER: Yes, I am.

Q Mr. Wasser, what antitrust matters have you handled in the last five years?

A I handled a matter for a client in the case of The State of New Jersey versus Abbott Laboratories, et al.

Q Who was your client, Mr. Wasser?

MR. SCHLESINGER: I object.

Q Is the case on file with the courthouse,

violation of the antitrust laws by these firms.

Q Do you recall how many defendants there were in that case?

A I think there were approximately two hundred defendants, all corporations and some individuals.

Q And you represented one of these two hundred defendants.

Did you in that case make an application for attorneys' fees?

A The case is still continuing.

Q So that you had not done so to this time?

A Not an application with the court, but I have been paid by my client on account.

Q Was your payment based on an hourly rate of compensation?

MR. SCHLESINGER: I object to any fee arrangements he has in any other case.

Q Are you going to follow Mr. Schlesinger's instruction not to answer that, Mr. Wasser?

A Yes.

Q In addition to your representation of -- is it Central Plumbing?

A Central Plumbing & Heating Company. And another defendant, M. Bower & Sons.

Q Was that the rate you charged in both of the matters to which you have referred?

A On one of the matters.

MR. SCHLESINGER: Wait, excuse me. Can I have that question back, please.

(Question read back.)

MR. SCHLESINGER: I object to what he is charging on those matters as specific retainers. What he testified, I believe, was that his usual rate was $100 an hour for these cases.

MR. MacCRATE: No, I object, Mr. Schlesinger that was not the testimony. I have asked the witness a direct question with respect to the two matters.

MR. SCHLESINGER: I am going to object with respect to those two matters.

MR. MacCRATE: And you instruct Mr. Wasser not to answer?

MR. SCHLESINGER: Yes.

Q Mr. Wasser, I show you a document that I will mark as Wasser Exhibit 20, a copy of which you have produced to us, and ask you if that document relates to one of the matters to which you have just referred.

A Yes.

(Document referred to above marked Defendants' Exhibit Wasser 20 for identification, this date.)

MR. SCHLESINGER: For the record, I am objecting to the marking of this exhibit. I was not aware that this was produced and I consider it confidential. So I want my objection on the record.

Now that counsel has had it, he asked a question and it has been answered.

Q To which of the two matters to which you have previously referred did this fee statement, Wasser Exhibit 20, relate?

MR. SCHLESINGER: Objection.

Q Mr. Wasser, did your charge to the other client to which you have referred -- was it made at the same hourly rate as appears on Wasser Exhibit 20?

MR. SCHLESINGER: Objection.

MR. MacCRATE: And you are instructing Mr. Wasser not to answer?

MR. SCHLESINGER: Right.

Q Mr. Wasser, has the fee statement, Wasser Exhibit 20, been paid?

MR. SCHLESINGER: Objection.

MR. MacCRATE: Are you instructing the witness not to answer?

MR. SCHLESINGER: I certainly do.

Q Mr. Wasser, in addition to the two matters that you have now identified, have you participated in any other antitrust matters?

A Yes.

Q Would you identify those for us, please?

A No, it would violate my client's confidence. It is still pending.

Q Are any of the matters court proceedings, Mr. Wasser?

A They are developing into court proceedings.

Q But to this time no proceedings have commenced in court?

A They have, by the government. My client is -- I am now proceeding with a civil case.

MR. SCHLESINGER: You haven't actually commenced an action yet?

THE WITNESS: No, I just worked on it.

Q Are there any other antitrust matters on which you have worked?

A In the last five years?

Q When you refer to "White House proceedings," you are not referring to any court proceedings, are you?

A The hearing was designated by the President to take place in the White House and file briefs. I was consulting with my clients.

Q Was there a court proceeding that you appeared in, Mr. Wasser, or was this an administrative proceeding before Executive Office of the Government?

A It was an administrative proceeding and Congressional proceeding designed to change the tariff laws.

Q Have you ever, prior to this time, made an application for attorneys' fees in an antitrust action?

A Application to client or to the court?

Q Application to the court for attorneys' fees?

A No.

Q With respect to the legal services that you have rendered to FLM Collision Parts, Inc., other than this action, what have been your billing arrangements

MR. SCHLESINGER: Can I hear the question, please.

(Question read back.)

MR. SCHLESINGER: Objection. I instruct him not to answer.

Q With respect to accounting services that you have rendered to FLM Collision Parts, what have been your billing arrangements?

MR. SCHLESINGER: Excuse me. Relating to this particular matter?

Q With respect to other matters, Mr. Wasser.

MR. SCHLESINGER: Same objection.

Q What arrangement or arrangements have you had during the last four years with FLM Collision Parts, Inc. with respect to the rendering of legal services, Mr. Wasser?

MR. SCHLESINGER: Objection .

MR. MacCRATE: You instruct him not to answer?

MR. SCHLESINGER: Yes, I do.

Q During the last four years, what billing arrangements have you had with FLM Collision Parts, Inc. with respect to accounting services, Mr. Wasser?

MR. SCHLESINGER: Same objection.

MR. MacCRATE: You also instruct him not to answer that?

MR. SCHLESINGER: Yes.

Q Have you had any arrangements with FLM Collision Parts, Inc. for a payment of compensation for your legal services, Mr. Wasser?

MR. SCHLESINGER: Same objection, same instruction.

Q Have you had any arrangement with FLM Collision Parts for the rendering of accounting services?

MR. SCHLESINGER: Same objection, same instruction.

Q Do you bill FLM Collision Parts, Inc. on an hourly, contingent or flat-fee basis, Mr. Wasser?

MR. SCHLESINGER: Same objection, same instruction.

Q Mr. Wasser, I show you Wasser Exhibit 5 and ask you, please, to identify that for the record.

A This is a list of hours in which my wife, Shirley, worked with me on this case, other than legal stenographic work.

(Document referred to above marked Defendants' Exhibit Wasser 5 for identification, this date.)

Q What was the nature of your wife's work in that respect, Mr. Wasser?

A A number of procedures; she reviews my memoranda;

February 1973.

(Documents referred to above marked Defendants' Exhibit Wasser 10 for identification, this date.)

Q It indicates a filing date of February 15, Mr. Wasser.

A Yes.

Q Did you work with any other counsel in the preparation of that complaint?

A No.

Q You had no assistance in its preparation?

A No.

Q Did you solicit ideas from any other lawyers with respect to the preparation of the complaint?

MR. SCHLESINGER: Objection. I instruct him not to answer.

MR. MacCRATE: Would you state the grounds for the instruction, Mr. Schlesinger?

MR. SCHLESINGER: Any work or any ideas or any discussions with other lawyers is of no importance. What did he do; how much time did he spend doing it?

MR. MacCRATE: And my question relates -- did he solicit information and assistance from

other lawyers?

MR. SCHLESINGER: No, not did he solicit information; did he spend time with other lawyers in preparing the complaint? He said no. Did he spend any time talking to lawyers, how much did he spend? I am not interested in what the other lawyers said to him.

MR. MacCRATE: Mr. Schlesinger, that is precisely what I am asking the witness.

BY MR. MacCRATE:

Q Mr. Wasser, did you have conversations with other lawyers prior to filing the complaint in this action?

A Yes, I did.

Q Did you speak with them about this matter before you drafted the complaint?

A Yes.

Q Did they provide assistance to you in connection with legal questions?

MR. SCHLESINGER: Objection. I instruct him not to answer.

Q Did you request assistance from other lawyers?

MR. SCHLESINGER: Let me hear that

question, please.

(Question read back.)

MR. SCHLESINGER: I am going to object and instruct him not to answer. Did he spend time with other lawyers in preparation of the complaint; how much time did he spend? That's the case. Not what he asked them or what they told him.

Q Mr. Wasser, in your affidavit you have indicated that that 280 hours of your time was spent in pre-complaint procedures.

Did any portion of that time relate to consultation with other lawyers?

MR. SCHLESINGER: Can I have that question again.

(Question read back.)

A I don't recall if it was before the complaint or after the complaint.

Q So you cannot tell us whether any portion of that 280 hours was spent in consultation with other lawyers?

A I don't recall whether it was before the complaint or after the complaint.

Q But you do recall that there came a time

when you had discussions with other lawyers?

A Yes.

Q Can you tell us who those lawyers were?

MR. SCHLESINGER: Objection.

Q Can you fix the time of any of those discussions with other lawyers?

A Part of the time was prior to trial, when I was very much interested in bringing in additional counsel for the trial.

Q Mr. Wasser, I show you Wasser Exhibit 11 of May 14, 1973 and ask you if that is not your applicatio for preliminary injunction?

A This was a notice of motion in connection with one of my applications for preliminary injunction.

(Document referred to above marked Defendants' Exhibit Wasser 11 for identification, this date.)

Q That was your initial application, was it not, in May of 1973?

A Yes.

Q From that time, in May 1973, until March 1974, you were at various times involved in seeking a preliminary injunction in this action; is that correct?

A Yes.

with Mr. Lewis Stackell or with Mr. Herman Stuhl in connection with that period of time?

A No.

Q Have you included in that --

A Pardon me, can you repeat that question?

MR. SCHLESINGER: Give me the question back, please.

(Question read back.)

A Yes, my time only.

Q How much of your time was spent with Mr. Stackell or with Mr. Stuhl during that period?

A I don't recall. It was a small amount of time.

MR. SCHLESINGER: Is it reflected anywhere?

THE WITNESS: It is marked in the diaries.

Q Did you incorporate their work product into the papers that you used in this action, Mr. Wasser?

MR. SCHLESINGER: Let me hear that question again.

(Question read back.)

MR. SCHLESINGER: I object to the question and instruct him not to answer. Whatever work product they had given or if there was any, I don't know, it would be

confidential.

Q I show you Wasser Exhibit 13, proposed findings of fact and conclusions.

Was that document prepared by you or by Mr. Lewis Stackell?

A This was prepared by me.

Q Did Mr. Stackell participate in the preparation of the document?

A He participated for a short period of time.

Q Did he provide you with a draft of the document?

A No.

Q What was his participation in connection with the preparation of that document?

MR. SCHLESINGER: Let me hear that question, please.

(Question read back.)

MR. SCHLESINGER: I object. We are not making any application for costs by way of attorneys' fees for Mr. Stackell's time in the preparation of Wasser Exhibit 13.

Q Mr. Wasser, are you making any application for time spent in connection with the preparation of Wasser Exhibit 13?

A Yes.

Q Is Wasser Exhibit 13 a joint product of your work and of Mr. Stackell's work?

A Joint portion was a very small part of the preparation.

Q And Mr. Stackell's name is shown on that document, is it not, as being of counsel?

A Yes.

Q I show you Wasser Exhibit 14, plaintiff's proposed conclusions of law, and ask you if you participated in the preparation of that document?

A Yes.

Q That duplicates in part, does it not, Wasser Exhibit 13?

MR. SCHLESINGER: Objection. The two documents speak for themselves. Whatever is in them can be read and determined.

MR. MacCRATE: You are instructing the witness not to answer?

MR. SCHLESINGER: That is right.

Q And, Mr. Wasser, will you follow Mr. Schlesinger's instruction in that respect?

A Yes.

Q Mr. Wasser, I show you Wasser Exhibit 15

Q With whom did you meet?

A I met with Mr. Julien, Mr. Schlesinger and Mr. Jaroslawicz.

Q Was a retainer agreement arranged at that time?

MR. SCHLESINGER: Objection. I instruct him not to answer.

Q Did you enter into any agreement, you, Mr. Wasser, with the Julien & Schlesinger firm?

MR. SCHLESINGER: Objection. I instruct him not to answer.

You mean a retainer agreement?

MR. MacCRATE: Any agreement.

MR. SCHLESINGER: Relating to what?

MR. MacCRATE: Relating to the handling of this case.

MR. SCHLESINGER: Any written agreement?

MR. MacCRATE: Written or oral.

MR. SCHLESINGER: I object to the question.

Q Did you explain to Mr. Julien why you wanted him to come into this case?

MR. SCHLESINGER: Objection. I instruct him not to answer.

Q Did you have any agreement with Mr. Julien with respect to the sharing of fees?

MR. SCHLESINGER: Objection. I instruct him not to answer.

Q Did you have any agreement with Mr. Julien or with Julien & Schlesinger regarding the division of responsibilities in this case?

MR. SCHLESINGER: Objection. I instruct him not to answer.

Q Did you have any agreement with Mr. Julien or with Julien & Schlesinger regarding the division of labor in this case?

MR. SCHLESINGER: Hold it. Other than conversations that -- when we say, "You do this and I will do that," or are you talking about some formal agreements?

MR. MacCRATE: Any agreements whatsoever.

MR. SCHLESINGER: I object and instruct him not to answer. Whatever he did, ask him what he did.

Q Mr. Wasser, after July 30, 1974, when you state in the application that the Julien & Schlesinger firm were retained, did you spend a substantial amount of time reviewing with them the background of this case?

A Could you clarify the question? I think it is a little ambiguous.

Q Did you make available to them your background in this case?

A Yes.

Q How did you make that background available to them?

A I had a conference. I turned over many of my files to them.

Q Could you identify the individuals in the Julien & Schlesinger firm with whom you had those conferences and to whom you turned over these materials?

A The three gentlemen that I referred to.

Q Did you make available to them the legal research that you had done in this matter?

A Yes.

Q Did you make any arrangements with Mr. Julien or Mr. Schlesinger or Mr. Jaroslawicz regarding who would do what work in connection with the preparation for the case?

MR. SCHLESINGER: I object to any arrangements, what he did and what we did is subject to the inquiry. But particular arrangements I will object to.

Q Did you have any special responsibilities with respect to preparing this case for trial?

MR. SCHLESINGER: I object to the terminology "special responsibilities." What did he do?

MR. MacCRATE: You instruct him not to answer?

MR. SCHLESINGER: Yes.

Q Did you have primary responsibility for the preparation of any aspect of this case for trial?

MR. SCHLESINGER: Again, I object to the question. Same instruction.

MR. MacCRATE: Mr. Wasser indicates that he is going to call his son and in view of the fact it is now twenty after five, and due to the fact that we were not able to start this deposition earlier today, as I had requested and was prepared to proceed early this morning, I am going to have to suspend at this time. And I would like to suggest that we resume next Thursday, which would be February 19, and we will be prepared also to proceed on Friday, February the 20th, to conclude these

A Steve McKee, John Andidero and the staff.

Q Mr. Wasser, do you have a retainer agreement with FLM for the performance of legal services in connection with this case?

MR. SCHLESINGER: This was asked last time, and I object to it.

MR. DALLAS: Do you instruct him not to answer?

MR. SCHLESINGER: Please don't go into what was asked and answered last time.

MR. DALLAS: Mr. Schlesinger, I am only inquiring as to the existence --

MR. SCHLESINGER: You know it was asked.

MR. DALLAS: -- of a retainer agreement.

MR. SCHLESINGER: The very same question was asked.

Just go on.

MR. DALLAS: Are you instructing the witness not to answer?

MR. SCHLESINGER: Just like I did last time.

BY MR. DALLAS:

Q Mr.Wasser, what was the date of any agreement?

MR. SCHLESINGER: Objection.

MR. DALLAS: Do you instruct him not to answer?

MR. SCHLESINGER: You don't have to ask that. I object. He is not going to answer.

Q Mr. Wasser, do you have an agreement to share any attorney fees or other compensation with Mr. Lewis Stackell?

MR. SCHLESINGER: Objection.

Q Do you have any such arrangement with Mr. Herman Stuhl?

MR. SCHLESINGER: Objection.

Q With anyone else?

MR. SCHLESINGER: Objection.

Q Mr. Wasser, I believe you testified earlier that you sought trial counsel; is that correct?

MR. SCHLESINGER: That is not his testimony. I object to the question.

Q Mr. Wasser, did you, prior to the retention of Messrs. Julien & Schlesinger, seek trial counsel?

MR. SCHLESINGER: I object and I instruct him not to answer anything that he did in obtaining counsel. It has absolutely nothing to do with the fee application.

parts only - 17.6 percent equals 220,041."

Q What does that mean?

MR. SCHLESINGER: Just a minute. This was testimony on the trial, he testified. I am not going to go into what his damage calculations mean or don't mean.

If you want to ask him, did he work on it and how much time he spent on it--we are not here to go over damages. If you want to cross-examine on damages, you will have your chance at the trial. This deposition wasn't designed to go into the damages --

Q Mr. Wasserman, was this prepared by you in your capacity as an accountant?

A No.

Q Was it used by you -- by "this," I am referring now to Wasser Exhibits 31, 32 and 33 -- in any way in your testimony for plaintiff?

A Whatever --

MR. SCHLESINGER: Objection. Now, please, they are even marked as exhibits on the trial. You know what they were used for. You were there. You heard it. It is in the record that --

MR. DALLAS: Would you please calm

yourself down?

MR. SCHLESINGER: No, you are wasting a great deal of time on matter that he has gone over and that he testified on in court.

BY MR. DALLAS:

Q Did you testify to these in your capacity as a certified public accountant?

MR. SCHLESINGER: Objection. Go and look at the court record. You have a full copy of it.

MR. DALLAS: Are you instructing him not to answer?

MR. SCHLESINGER: You are wasting a great deal of time.

Q Mr. Wasser, do you recall how much time was spent by you in the preparation of any of these documents?

A No.

Q Do you recall how much time was spent by you in preparation for your testimony as a certified public accountant?

A Well, I can't answer a question with a negative pregnant whatever.

Q Did you participate in the trial as a

(Discussion off the record.)

MR. SCHLESINGER: On the record. The diary that is submitted to you has entries for January 29, 1976, yes.

MR. DALLAS: That's all I wanted to establish, thank you.

Q Mr. Wasser, just a few final questions. Let me hand you again Wasser Exhibit 37-A and Wasser Exhibit 38. I ask you if the method of computing the incentive credits, as reflected in Wasser Exhibit 37A--

A I testified to that in court.

Q -- was based on a precise calculation.

MR. SCHLESINGER: Excuse me. Now, that has been testimony in court on damages. You will have your chance on cross-examination.

Whatever is on the record I will stipulate. There is no question here on damages. If you want to know the hours he spent -- you went into that already.

Q Mr. Wasser, the method that was used, as reflected in Wasser Exhibit 37-A is different, is it not, in computing the incentive allowance from that which was employed in Wasser Exhibit 33 --

MR. SCHLESINGER: I object.

Q -- Wasser Exhibit 31?

MR. SCHLESINGER: Objection.

Q -- Wasser Exhibit 32?

MR. SCHLESINGER: Objection. All that has nothing to do with damages. He has been under oath on the trial on damages. You may cross-examine him to your heart's content.

Here we are only involved in the hours he spent in calculating these things, and he has already testified to that,and that's the end of that.

MR. DALLAS: Are you instructing him not to answer?

MR. SCHLESINGER: Oh, please, stop wasting time. That's it.

MR. DALLAS: On the record still, Mr. Wasser. The temperatue in here, while better than it was on Friday, still leaves much to be desired. It is a relatively small room, and there is no air conditioning. We have had to keep the door open to get a modicum of ventilation.

Pursuant to our notice of deposition, this deposition was scheduled to be in our offices,

Documents Refused To Be Produced
As Requested In Subpoenas Dated February 4, 1976

Subpoena Addressed to David L. Wasser:

"2. Any documents referring or relating to any meeting, discussion, conference or other written or oral communication between David L. Wasser and any legal counsel for Ford Motor Company prior to the filing of the complaint in the above entitled action and relating to the subject matter thereof.

"3. Any documents referring or relating to any meeting, discussion, conference or other written or oral communication between David L. Wasser and any representative of the Federal Trade Commission before the filing of the complaint in the above entitled action and relating to the subject matter thereof.

"4. All memoranda of law or other documents reflecting legal research of David L. Wasser, Esq. and/or anyone working under his direction, supervision or control at any time in connection with the above entitled action.

"5. Such documents as will show the established hourly rates charged for professional legal services rendered by David L. Wasser, Esq. and/or by any other person acting under his direction, supervision or control in a legal or paralegal capacity during the period of November 1, 1972 to December 31, 1975.

"6. Any retainer agreement or other document (including but not limited to all fee statements)

reflecting any compensation arrangement between FLM Collision Parts, Inc. and/or either of its principals and David L. Wasser, Esq., with respect to any legal services rendered thereto and with respect to any legal services rendered in relation to the above entitled action.

"7. Any agreement between David L. Wasser, Esq. and Julien & Schlesinger, P.C., with respect to compensation of counsel, sharing of fees and/or payment of expenses in connection with the above entitled action.

"10. Any retainer agreement or other document (including but not limited to all fee statements) reflecting any compensation arrangement between FLM Collision Parts, Inc. and/or either of its principals and David L. Wasser, C.P.A. with respect to accounting services rendered thereto and with respect to any accounting services rendered in relation to the above entitled action."

Subpoena Addressed to Julien & Schlesinger, P.C., Alfred S. Julien, Stuart A. Schlesinger and David Jaroslawicz:

"2. Such documents from the files of your firm as will show the established hourly rates charged for the services of the individual attorneys to whom this subpoena is addressed during the period July 1974 to December 1975.

"3. Any retainer agreement or other document reflecting any compensation arrangements between FLM Collision Parts, Inc. and/or either

of its principals and Julien & Schlesinger P.C., with respect to the above entitled action.

"4. Any agreement between Julien & Schlesinger, P.C., and David L. Wasser, Esq., with respect to compensation of counsel, sharing of fees and/or payment of expenses in connection with the above entitled action."

CIVIL ACTION NO. 73 Civ. 713 (TPG)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF
NEW YORK

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

AFFIDAVIT IN OPPOSITION TO PETITION FOR ATTORNEYS' FEES AND COSTS

SULLIVAN & CROMWELL
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ATTORNEYS FOR
Defendants

1792-A

Defendants' Supplemental Memorandum on Attorneys' Fees and Costs, March 1, 1976

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

- x

FLM COLLISION PARTS, INC.,

Plaintiff,

-against-

73 Civ. 713 (TPG)

FORD MOTOR COMPANY and FORD MARKETING CORPORATION,

Defendants.

- x

DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN RESPONSE TO PLAINTIFF'S PETITION FOR AN AWARD OF ATTORNEYS' FEES AND COSTS

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William A. Zolbert
Office of the General Counsel
Ford Motor Company

Of Counsel.

March 1, 1976.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

FLM COLLISION PARTS, INC., Plaintiff,	:	
-against-	:	73 Civ. 713 (TPG)
FORD MOTOR COMPANY and FORD MARKETING CORPORATION, Defendants.	:	

DEFENDANTS' SUPPLEMENTAL MEMORANDUM IN RESPONSE TO PLAINTIFF'S PETITION FOR AN AWARD OF ATTORNEYS' FEES AND COSTS

This memorandum is submitted by defendants to supplement their memorandum of February 6 addressed to plaintiff's petition for attorneys' fees and costs, due principally to events which have transpired since that date.

On February 9, the Court conducted a hearing during which a substantial portion of time was devoted to plaintiff's petition for attorneys' fees and its claim for costs. In response to suggestions made by the Court, defendants conducted depositions of plaintiff's counsel on February 13, 19 and 20, 1976. Based on the information obtained by defendants through the deposition testimony and

the limited response to defendants' subpoena dated February 4, 1976, defendants have submitted the affidavit of Robert MacCrate which sets forth the factual record relevant to the petition for attorneys' fees and costs and a statement of defendants' position regarding a proper measure of attorneys' fees in this action.

In addition, defendants submit that based upon the information obtained and the applicable principles of law: (1) the failure of Julien & Schlesinger, P.C. to maintain any time records which document the time claimed to have been spent requires a substantial reduction in any fee awarded by the Court for their legal services; (2) no "contingency" or "risk" factor should be considered which would allow an award of attorneys' fees in excess of an award based on a documented hourly basis and (3) no award of costs should be allowed for any accounting services rendered nor should any award of costs for paralegal services be made unless such services are demonstrated to have related to plaintiff's recovery and the amount awarded for such services is limited to verified out-of-pocket expenses.

1. Failure of Julien & Schlesinger to Maintain Time Records

During the course of the hearing held on February 9, Mr. Julien, plaintiff's chief trial counsel, conceded that his firm did not maintain any record of time spent on this case (Tr. 76) and Mr. Schlesinger confirmed the lack of such documentation in his deposition conducted on February 20.

(Schlesinger deposition, pp. 7-9). This failure of Julien & Schlesinger to maintain time records, despite their presumed awareness that if the plaintiff were successful it would be statutorily entitled to reasonable counsel fees, is in direct conflict with the repeated admonitions of the Second Circuit against such practices. In re Hudson & Manhattan Railroad Co., 339 F. 2d 114 (2d Cir. 1964); In re Borgenicht, 470 F.2d 283 (1972).

In Hudson & Manhattan Railroad Co., the Court declared:

> "We wish to emphasize that any attorney who hopes to obtain an allowance from the court should keep accurate and current records of work done and time spent .... There is no excuse for an established law firm to rely on estimates made on the eve of payment and almost entirely unsupported by daily records or for it to expect a court to do so." 339 F.2d, at 115.

Moreover, in Borgenicht the Court warned:

> "The failure of appellee here to keep proper records indicates that some other course may be required to obtain compliance with what we regard as a desirable practice." 470 F.2d, at 284.

Notwithstanding the virtually complete absence of any contemporaneous record, Julien & Schlesinger have drawn up a purported statement of hours claimed to have been spent on the case (Wasser Exhibit 34) some 18 months after they were retained and 15 months after the trial commenced. Mr. Schlesinger claimed that this document

represented an accurate reconstruction of hours because the attorneys involved knew the dates various memoranda were filed and the dates they were in court. (Schlesinger deposition, pp. 15-16.) But the memoranda submitted during and after the trial show that substantial time was devoted to issues of liability and damages which were ultimately rejected by the Court (see MacCrate afft. ¶35) and Mr. Schlesinger was unable to recollect how much time was spent on these issues. (Schlesinger deposition, pp. 39, 43-47, 57-60).

The lack of documentation in this case is far different from that which faced the Court in the recent case, Michelman v. Clark-Schwebel Fiber Glass Corp., 1975-2 CCH Trade Cas. ¶ 60,551 (S.D.N.Y. 1975). There the Court awarded attorneys fees, even though contemporaneous time records had been lost, since an accurate reconstruction of time spent could be made from ledger cards that had been prepared contemporaneously on the basis of the now lost time records. 1975-2 CCH Trade Cas., at 67,413-14. Here, as in Hudson & Manhattan Railroad Co., plaintiff's counsel ask the Court "to rely on estimates made on the eve of payment and almost entirely unsupported by daily records."

We submit that to allow plaintiff's counsel to indulge in such a practice penalizes defendants for

the careless record keeping of plaintiff's counsel and nullifies the Second Circuit's expressed desire to curb these practices. For this reason we believe a substantial reduction in any fee award for the services of Julien & Schlesinger is in order.

2. Exclusion of "Contingency" or "Risk" Factors

Plaintiff contends in its fee petition that the fact that its counsel prosecuted this action on a contingent fee basis is an important "risk factor" which should be considered by the Court. (Fee Petition, pp. 8-10) Significantly every case cited by plaintiff in support of this proposition involves either a non-antitrust action or a settlement of an antitrust class action under the so-called "equitable fund" doctrine. With one exception noted below, our research has similarly failed to discover a single non-class action antitrust case in which a court made an incremental "contingency" or "risk factor" award.

We do contend, however, that plaintiff's contingent fee arrangements with counsel, as well as any fee aplitting arrangements among counsel, are relevant to assuring that any award made by the Court pursuant to Section 4 of the Clayton Act together with any contingency fees received by counsel from plaintiff's damages are not excessive and

in violation of DR 2-106(A) of the Code of Professional Responsibility.

When awarding counsel fees in a treble damage antitrust action it is important to distinguish them from awards made under the equitable fund doctrine. Under this doctrine, awards are made from the fund to counsel and are analogous to contingent fee arrangements in that any award to counsel results in a corresponding reduction in the amount ultimately received by the prevailing parties. Thus once the fund is established, the defendants bear no obligation to pay additional amounts for attorneys' fees. Because of the similarity between contingent fee arrangements and the equitable fund doctrine it is appropriate in the latter context to award attorney fees based on consideration of the contingent nature of success.

In contrast, in the case of private antitrust actions, the statute assures the successful plaintiff threefold its damages. In effect, the statute provides a "built-in" contingency factor. A contingent fee arrangement between plaintiff and its counsel can, therefore, permit the attorney to share in the trebled award and still leave the plaintiff, after attorneys' fees are deducted, with a net recovery well in excess of any loss it may have sustained. See Farmington Dowel Products Co. v. Forster Mfg. Co., 421 F.2d 61, 89 (1st Cir. 1970).

In this regard it is noteworthy that the factors articulated in Hanover Shoe, Inc. v. United Shoe Machinery Corp., 245 F. Supp 258, 302 (M.D. Pa. 1965),* which are frequently cited as the relevant guides in awarding attorneys' fees to successful plaintiffs in non-class action antitrust suits, make no mention of a "contingency" or "risk factor." Indeed, this issue was addressed in a very recent decision, Pacific Engineering & Products Co. of Nevada v. Kerr-McGee Corp., 1976-1 CCH Trade Cas. ¶ 60,724 (D. Utah 1976) where the court stated:

> "The remaining question is whether or not it is appropriate to include a "risk" factor which would increase this award. Though it is clear that a risk factor is appropriate in class action cases, plaintiffs have cited no non-class action case where a risk

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* These factors include:

> (1) whether plaintiff's counsel had the benefit of a prior judgment or decree in a case brought by the Government, (2) the standing of counsel at the bar -- both counsel receiving the award and opposing counsel, (3) time and labor spent, (4) magnitude and complexity of the litigation, (5) responsibility undertaken, (6) the amount recovered, (7) the knowledge the court has of the conferences, arguments that were presented and of the work shown by the record to have been done by attorneys for the plaintiff prior to trial, (8) what it would be reasonable for counsel to charge a victorious plaintiff.

> factor has been used, nor has it generally been listed as a factor to be considered. It would not be proper to extend a statute awarding attorneys' fees to the successful litigant so as to compensate the litigant for the possibility of failure as well as the reality of success." p. 68,114.

Our research has indicated that in only one decision, Michelman v. Clark-Schwebel Fiber Glass Corp., 1975-2 Trade Cas. ¶ 60,551 (S.D.N.Y. 1975) has a court applied a "risk factor" to enhance an attorneys' award in a non-class action antitrust case. In that decision, however, Judge Tenney relied on two class action decisions, City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974) and Lindy Bros. Builders v. American Radiator & Standard Sanitary Corp., 382 F.Supp. 999 (E. D. Pa. 1974), and one non-class action decision which has been recently reversed, DeFillippo v. Ford Motor Co., 378 F. Supp. 456 (E.D. Pa. 1974), rev'd, 1975-2 CCH Trade Cas. ¶ 60,319 (3d Cir. 1975). 1975-2 CCH Trade Cas., at 67,415-16. Thus, we submit, that on this point Michelman lacks precedential support and should not be followed.

Plaintiff also cites as authority for the "contingency" factor DR 2-106 of the Code of Professional Responsibility which lists as the last of eight factors to be used as guide in determining the reasonableness of a fee: "Whether the fee is fixed or contingent." The First

Circuit squarely considered the relevance of the factor to a fee award determination under Section 4 of the Clayton Act in Farmington Dowel Products Co. v. Forster Mfg. Co., 421 F.2d 61 (1st Cir. 1970):

> "Secondly, we believe that the fact that a fee arrangement is contingent upon success is a factor for the determination under the Canons, Canon 12(5), although it would not be for Section 4. Obviously, the fact that the attorney is willing to take an all-or-nothing arrangement might justify a fee which is higher than the going rate in the community. Again, this is just one factor but it is a factor which is irrelevant to the Section 4 determination. 421 F.2d, at 90 (emphasis supplied).

Farmington is instructive on another point -- the relationship between the statutory award of attorneys' fees under Section 4 and any contingent fee arrangements between plaintiff and its counsel. In its fee petition plaintiff acknowledges that it has a contingent fee arrangement with its counsel (Fee Petition, p. 8); however, plaintiff's counsel have steadfastly refused to produce documents or give testimony relating to the nature of their fee arrangements with plaintiff. In Farmington, the First Circuit held that, while the terms of any fee arrangement between counsel and plaintiff had no bearing on a Section 4 award, it was relevant to the trial court's obligation to assure that the Canon of Ethics' proscription against

excessive fees was not being violated by the amount received by the lawyer pursuant to a contingency fee arrangement coupled with the amount received from the Section 4 award.* 421 F.2d at 87. The court went on to note:

> "We are not saying that a court should inquire sua sponte into actual counsel fees in every case which comes before it, but only that a court may in its discretion inquire into such issue, particularly when it is brought to the court's attention as here." 421 F.2d, at 87-88.

In view of plaintiff's counsel's refusal to provide any information regarding their fee arrangements, despite defendants' repeated requests, we submit that this is an issue which particularly requires inquiry by the Court. While we believe that defendants should also be allowed access to this information, defendants have no objection to in camera review of counsel's fee arrangements should the Court deem such procedure appropriate. In any event, we urge the Court to assess not only plaintiff's fee arrangements with counsel but also any fee splitting

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* DR 2-106(A) of the Code of Professional Responsibility provides:

> "A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee."

arrangements among counsel to assure itself "that it is not an unwitting accessory to an excessive fee." (ibid., at 87).

3. Claim for Costs

In its fee petition, plaintiff seeks an award for various accounting services rendered by Mr. Wasser and two other certified public accountants, claiming such amounts as recoverable "costs" under 15 U.S.C. § 15. (Fee Petition, pp. 13-14). While no claim for "paralegal" services is made in the Fee Petition, Mr. Wasser states in his affidavit that 157 hours were expended by paralegals at an hourly rate of $15. (Wasser afft. p. 9). Defendants submit that amounts expended for accounting services are not recoverable as "costs" under 15 U.S.C. § 15; moreover, with respect to the claim for paralegal services, the deposition of Mr. Wasser demonstrates that the hourly rate claimed for such services is grossly inflated, and were the Court to make any award for these services it should be limited to verified out-of-pocket expenses.

Turning first to plaintiff's claim for accounting services as part of its costs of suit, the Second Circuit considered and rejected the argument that fees paid to experts are recoverable costs under 15 U.S.C. § 15 in Trans World Airlines, Inc. v. Hughes, 449 F.2d 51 (2d Cir. 1971):

> "TWA's last contention is that it should be compensated for fees paid to its experts as part of its 'costs of suit,' 15 U.S.C. § 15. This precise issue has long since been decided contrary to TWA's position in this Circuit, Straus v. Victor Talking Machine Co., 297 Fed. 791 (2d Cir. 1924) and TWA has not persuaded us that that decision, or the unanimous host of cases relying on Straus in this and other jurisdictions should be overruled. [Citation omitted]." 449 F.2d, at 81.

Furthermore, in every case we have found where fees paid for accounting services were sought to be recovered as part of the costs of suit under 15 U.S.C. § 15, these claims were uniformly rejected. Advance Business Systems & Supply Co. v. SCM Corp., 287 F. Supp. 143, 162 (D. Md. 1968), mod. on other grounds, 415 F.2d 55 (4th Cir. 1969); Twentieth Century Fox Film Corp. v. Goldwyn, 328 F.2d 190, 224 (9th Cir.), cert. denied, 378 U.S. 880 (1964); Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 586 (10th Cir. 1961), cert. dism'd sub nom., Wade v. Union Carbide & Carbon Corp., 371 U.S. 801 (1962).*

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* The two cases cited by plaintiff in support of an award of costs for accounting services, Fey v. Walston & Co., Inc., 493 F.2d 1036 (7th Cir. 1974) and Brookside Theatre Corp. v. Twentieth Century Fox Film Corp., 11 F.R.D. 259 (W.D. Mo. 1951), are wholly inapposite to plaintiff's claim here. In Fey the Seventh Circuit reversed the trial court's award of attorneys' fees in a securities litigation and remanded for a new trial, ruling that "[t]he award of an expert witness fee beyond the statutory allowance was unauthorized on the record." 493 F.2d, at 1056.

(Footnote continued on next page)

In view of Mr. Wasser's inability to distinguish time spent as an accountant from time spent as a lawyer (see MacCrate afft., ¶¶ 7-9, 32-33, 42-43) and the fact that most, if not all, of Mr. Wasser's time after the retention of Julien & Schlesinger was devoted to bookkeeping and accounting matters (Wasser afft. p. 6; Schlesinger deposition, pp. 28, 41, 52), we strongly urge that Mr. Wasser should not be permitted through the device of merging his accounting activities into his legal activities to recover as taxable attorneys' fees the time spent as an accountant.

In addition, the amount claimed by Mr. Wasser in his affidavit as costs for both accounting and paralegal services are artificial -- reflecting not out-of-pocket expenses but instead an inflated figure of up to five times the amount actually expended by him. (Wasser deposition pp. 46-50).

In Brookside Theatre, the audit for which costs were recovered had been specifically authorized before trial by the court pursuant to an application filed by the plaintiff. The court noted that these costs were not authorized by statute and for this reason:

> "it is the opinion of the court that before such costs are incurred they should first be authorized by the court in pre-trial conference, or otherwise." 11 F.R.D., at 267,

No such authorization was sought by the plaintiff or given by the Court for the accounting services claimed here.

As set forth in the accompanying affidavit, Mr. Wasser compensated his two other certified public accountants at the rate of $15/hour but is claiming their services as a "cost" at the rate of $75/hour. For the services of his accounting assistant, Mr. Wasser paid $8/hour and is claiming at the rate of $15/hour. Likewise for the paralegal services of his wife and daughter, Mr. Wasser is claiming at the rate of $15/hour, having paid them only $10/hour and $3/hour respectively. (MacCrate afft., ¶ 47).

The cases are clear that expenditures for the services of a paralegal, if allowed at all (and if shown to be related to the actual recovery by plaintiff), are limited to the out-of-pocket expenses actually incurred. City of Detroit v. Grinnell Corp., 495 F.2d 448, 473 (2d Cir. 1974); Michelman v. Clark-Schwebel Fiber Glass Corp., 1975-2 CCH Trade Cas. ¶ 60,551, 67,413 (S.D.N.Y. 1975); but compare, Pacific Engineering & Production Co. of Nevada v. Kerr-McGee Corp., 1976-1 CCH Trade Cas. ¶ 60,724, 68,113-14 (D. Utah 1976) (no allowance for work done by law clerks and paralegals).

CONCLUSION

Defendants submit that the Court, applying the foregoing principles and the principles set forth in defendants' memorandum of February 6, 1976, should limit the award of attorneys' fees and costs to the amounts set forth in the accompanying affidavit of Robert MacCrate.

Dated: March 1, 1976

Respectfully submitted,

SULLIVAN & CROMWELL
Attorneys for Defendants
48 Wall Street,
New York, New York 10005
(212) 952-8100

Robert MacCrate
William M. Dallas, Jr.

William A. Zolbert
Office of the General Counsel
Ford Motor Company

Of Counsel.

ERRATA SHEET

Page 8 - Defendants' Supplemental Memorandum In Response to Plaintiff's Petition for an Award of Attorneys' Fees and Costs.

Citation to DeFillippo v. Ford Motor Co. should read: 378 F. Supp. 456 (E.D. Pa. 1974), rev'd on other grounds, 1975-2 CCH Trade Cas. ¶60,319 (3d Cir. 1975).

Transcript of Hearing on Damages and Attorneys' Fees,
February 9 and March 2, 1976

mcsr

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

FLM COLLISION PARTS, INC.,

Plaintiff,

- against - : 73 Civ. 713

FORD MOTOR CO. and FORD MARKETING CORPORATION,

Defendants.

----------x

B e f o r e :

HON. THOMAS P. GRIESA,

District Judge.

New York, N. Y.
February 9, 1976 - 4:00 p.m.

A p p e a r a n c e s :

JULIEN & SCHLESINGER, P.C.
Attorneys for Plaintiff;
By: ALFRED S. JULIEN, ESQ.,
STEWART S. SCHLESINGER, ESQ.,
DAVID JAROSLAWICZ, ESQ,

SULLIVAN & CROMWELL, ESQS.,
Attorneys for Defendants;
By: ROBERT MacCRATE, ESQ.,
WILLIAM M. DALLAS, JR., ESQ.

Also present:

William A. Zolbert, Esq.,
Stephen McKee.

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THE COURT: I think the main thing we need to do, at least the first thing, is to have the proof on damages.

Now, I have a brief from the plaintiff outlining the plaintiff's contention of law about submitting proof regarding damages accruing after the trial which we held in September and October, 1974, and I don't have any memorandum in opposition to that from the defendants, so I assume that they do not oppose that legal contention.

MR. MAC CRATE: Your Honor, forgive me. We delivered to your chambers on Friday our memorandum in opposition to plaintiff's proposed judgment of injunction and in support of a counter-proposed order judgment of injunction and in that at Page 4 we directed ourselves to this very point.

[Pause.]

THE COURT: Okay, that's a mistake. I'm sorry. It is covered. Somehow we just didn't put it down.

In any event, I am going to hear proof on damages up to the present time and I think that the defendants have been put on notice for a substantial period of time that there are these new issues in the case, because I called together right after I had filed a decision or the day I filed it. I forget what the date

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was.

Then we had a conference off the record and then at that time I posed the issue of whether in view of the long lapse of time between the trial in September and October 1974 and the date of filing of my decision whether it wouldn't be fair and in the interests of justice and efficiency to have proof that the damages accruing up to the present time, basically, and I filed my decision on liability December 19 and had you in at about that time, and that is almost two months ago.

So I just don't see any practical reason to require some kind of extra formalities and it is a matter of whether the plaintiff has submitted valid proof of damages, and that is that.

MR. MAC CRATE: I respectfully except, your Honor, and invite the Court's attention to Rule 15.There has been no effort in the intervening time by this plaintiff to supplement the complaint. The plaintiff has just sat back and done nothing by way of bringing before the Court this additional time period, and for the Court to go beyond the pleadings in this case and to pick up something post-trial, I respectfully submit would be beyond the power of the Court. There is no pleading. There is no opportunity to answer. There is no joinder

of issue and --

THE COURT: This is what I think confused me and maybe my law clerk just temporarily. You seem to make so much in your brief about the lack of a formal motion. There is no magic about having a formal motion here. There is no magic about having something called a pleading. There is no magic about any of the formalities you are talking about, and the first question is whether they have got the proof of the damages, and second whether you have adequate notice that you can meet that proof. Those are the only issues.

MR. MAC CRATE: No, sir, your Honor, with all due respect, there is a question of liability as well as of damages and there is no demonstration of liability with respect to this period.

THE COURT: You haven't reinstated the wholesale incentive allowance, have you?

MR. MAC CRATE: Whether this plaintiff can make any showing that he would have recovered any part of the wholesale incentive allowance had it been in force during the period is something that is not before the Court and can only be put before the Court with proper pleadings. This is not magic we are talking about. These are the pleadings by which matters are presented for

judgment in due course.

THE COURT: If you are prejudiced and need any time to meet the proof presented by the plaintiff, you can have more time. But what we have been trying to do since December 19 or so, indeed we were trying to do it on other issues before, was to try to get the parties to prepare on the issue of damages -- on all the issues to come before us including this issue of damages subsequent to October 1974, and I am perfectly glad, of course,to hear about what has happened since December 19 in the submission to you of evidence and contentions and if there is something that you are not able to meet because you are surprised about it, then you can have more time. But let's not have a lot of oratory about the necessity of formal pleadings because it is much too late for that and I really will not deny recovery on that basis.

If there is substantial unfairness to you in your inability to prepare, fine. We have had this hearing set for a much earlier date, you will recall, and you said that you couldn't prepare because you were too busy with other cases,and so forth, and we have given everybody all kinds of time and I certainly hope everybody is prepared today. So we will go forward and hear Mr. Julien's proof.

MR. MAC CRATE: If your Honor please, on February 3 we received a memorandum entitled, and it was only on February 3 that we received it, "Plaintiff's Memorandum of Law in Support of its Motion to Amend and Supplement its Complaint." Now, we have not to this day received any supplement or amendment to the complaint. We have a memorandum of law --

THE COURT: You are still talking about a formal pleading and I'm sorry, you may be right and I may be wrong, but I'm not going to spend a lot more time talking about it. Let's go on with the proof.

MR. MAC CRATE: Exception, your Honor.

THE COURT: Okay. You don't need to say, "Exception." Obviously if you disagree you've got an exception. This isn't the nineteenth century. Let's go on.

MR. JULIEN: If your Honor please, we have served upon our opponents not only the schedules, which I trust that your Honor has now --

THE COURT: Yes.

MR. JULIEN: -- but we have served them and have checked all of the original records from which these figures have been taken.

I refer first to Exhibit C, which is the

calculation of the incentive credits loss and here we have neither made projections nor speculations, but we have gone to the documents themselves and checked them against the lists of Ford Motor Company with respect to incentive.

THE COURT: We are having a trial on damages. You have to put a witness on and put exhibits in. To the extent it is documentary material it has been checked by Sullivan & Cromwell and it can all be stipulated, but we have got to go through with the proof.

MR. JULIEN: Yes. Mr. Wasser, would you take the stand.

D A V I D L . W A S S E R , called as a witness in behalf of the plaintiff, after having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JULIEN:

MR. JULIEN: Your Honor, I will say nothing about background and so forth. This is all in the record before with respect to this witness.

THE COURT: Of course.

Q Mr. Wasser, in preparation for the hearing on damages before his Honor, have you had prepared under your care and supervision Exhibit C, which has been

submitted to the Court and which is entitled, "Calculation of Incentive Credits Loss"?

A Yes.

Q Do you have that before you?

A Yes.

Q Would you state for the record from what records these computations were taken?

A These computations were taken from boxes of invoices --

THE COURT: Let's get this marked for identification in this trial and I would suggest starting the exhibits with the number 1,000 so that we are not going to mix them up with the other exhibits. Let's call this Plaintiff's Exhibit 1000 for identification.

MR. JULIEN: All right.

If your Honor please, I ask that there be marked for identification Exhibit C, heretofore submitted to the Court, "Calculation of Incentive Credits Loss," just this page.

[Plaintiff's Exhibit 1000 marked for identification.]

Q Very briefly, Mr. Wasser, what does this Exhibit 1000 for identification purport to show?

A This exhibit shows the incentive credits loss

in the period from November 1, 1972 through February 6, 1976 and the Ford cost on the parts related to these incentive credits as purchased by FLM Collision Parts, the plaintiff, and the third item shown is the Ford cost which is slightly less than the FLM cost.

Q In figuring incentive credits, from what source was the percentage of incentive credits taken?

A These were -- except for an estimate at the end when the Ford invoices were not delivered for the period from November 1, 1972 through December 22, 1975, the actual Ford invoices on the premises of the plaintiff were accumulated and the purchase items were traced to the Ford Motor Company's price back to calculate the actual incentive credits that were allowable if the plaintiff had been granted these credits. There were tapes prepared attached to each invoice. Then all of the invoices were added and the tape was attached to the outside of each folder.

I then supervised this and I check all of the outside tapes to make sure that within my total of Exhibit C --

THE COURT: You are losing me.

THE WITNESS: Yes.

THE COURT: You were attempting to calculate

the amount of wholesale incentive allowance which would have been applicable and granted on particular parts if Ford had allowed such allowances when parts were sold to FLM; right?

THE WITNESS: Right.

THE COURT: Is it correct that you or people working for you got from the plaintiff all of their invoices representing parts, crash parts purchased from the various dealers from November 1, 1972 on?

THE WITNESS: Yes, sir.

THE COURT: Did you have available with you during this work the Ford price lists that were applicable during the relevant times?

THE WITNESS: Yes, sir.

THE COURT: In other words, did the price list change?

THE WITNESS: There were changed price lists and these were taken into account.

THE COURT: But you had the changed price lists?

THE WITNESS: Yes,your Honor.

THE COURT: Is it true that if you had an invoice showing that FLM purchased a fender the people working on this project would look in the price list for

that date and see if a wholesale incentive allowance was allowed on a fender, that fender; right?

THE WITNESS: Yes, sir.

THE COURT: And then what would you do?

THE WITNESS: The staff supervised by Steve McKee's staff, under my supervision, would put in red crayon on each invoice next to each part the amount of the incentive credit allowable. Then they would take a tape of that which I would check.

THE COURT: So you accumulated a group of invoices with notations on them indicating that an amount of so-called incentive allowance was applicable for that part?

THE WITNESS: Yes.

THE COURT: And you put that amount down in red crayon?

THE WITNESS: Right.

THE COURT: Then you ran tapes of those amounts?

THE WITNESS: The red amounts.

THE COURT: I always have a little trouble with your tabulations, Mr. Wasser, and I'm having trouble today. Where is it that that shows the addition of the amounts of wholesale incentive allowances that were

derived in the way you have just described?

THE WITNESS: Well, your Honor, Exhibit C --

THE COURT: That is Exhibit 1000.

THE WITNESS: Right, Exhibit 1000 is a summary of other exhibits. There are so many boxes of invoices.

THE COURT: Let's go to the underlying things. Let's call it 1001.

MR. JULIEN: My opponent has those. Do you have those?

MR. DALLAS: The boxes of invoices are in our offices.

THE COURT: Did you make some worksheet from which --

THE WITNESS: Yes, we have exhibits ranging from C-2 to C-10.

THE COURT: You are talking about Exhibit 1000; right?

THE WITNESS: Right.

THE COURT: You've got these notations supporting Exhibits C-2 through C-10. What are they?

THE WITNESS: C-2 is the individual sheets on which are listed the actual boxes with the dates of deliveries, with the box number labeled on each box, so that --

THE COURT: Why did you call it C-2?

THE WITNESS: There was so much checking as the boxes were delivered we listed them on a worksheet to make sure that we didn't duplicate anything or leave anything out.

THE COURT: When you say boxes, what do you mean?

THE WITNESS: Boxes of invoices. Each box would have a number on, C-2. For example, we have this list. The first list, for example, Box 21 --

THE COURT: Does C-2 come from a particular box?

THE WITNESS: It comes from a number of boxes delivered to me at that time.

THE COURT: On this Exhibit 1000 you've got this thing called supporting exhibits and you've got C-1 and an audit sheet number. Is that one audit sheet that you call --

THE WITNESS: That was my number, the number of my sheet. When the boxes arrived I gave it the number 1.

THE COURT: Is it one sheet of paper?

THE WITNESS: Yes.

THE COURT: Do you have it here in court?

THE WITNESS: Yes, here is the original. This is the original.

THE COURT: This is C-2?

THE WITNESS: Yes.

THE COURT: There wasn't a C-1?

THE WITNESS: C-1 is the summary of other sheets.

THE COURT: You are tagging them to Exhibit C and that is why you will call them C-1 and C-2 and so on?

THE WITNESS: Yes.

THE COURT: Exhibit C was the exhibit to this damage calculation?

THE WITNESS: Yes.

THE COURT: And Exhibit C so-called is what we have called 1000 for the trial; right?

THE WITNESS: Yes.

MR. JULIEN: I may be able to save your Honor some time with respect to this.

Then this material was delivered to our opponents, I understand, relative to this exhibit. They have checked these amounts. I don't know that there is any complaint with respect to that.

THE COURT: Let me get this squared away.

Why don't we call C-2 Exhibit 1001.

MR. JULIEN: Yes, sir.

[Plaintiff's Exhibit 1001 marked for identification.]

MR. MAC CRATE: We have not, your Honor, been furnished as far as I can determine, a copy of that exhibit.

THE COURT: Of 1001?

MR. MAC CRATE: 1001.

THE COURT: What were you furnished?

MR. MAC CRATE: We did receive a copy of 1000, but I have not seen 1001.

THE COURT: Let's get, then, to that point.

How much of all this can we get stipulated?

MR. JULIEN: Your Honor, I think that Mr. MacCrate is prepared to tell you that they have checked the invoices which constitute the predicate for Exhibit 1000 and they have checked the allowance, the incentive credit allowance claimed with respect to that and I think that they have found no inaccuracies with our claims with respect to that.

THE COURT: Is that right?

MR. MAC CRATE: We have checked computations, your Honor through the end of December 1975. There was added the computations for the first weeks of 1976.

We have not had any information on that until this past week.

THE COURT: In other words, you have confirmed that the series of figures at the top of Exhibit 1000, $236,121.15 and that is okay; is that right?

MR. MAC CRATE: I will not say it is okay, your Honor. I will say that we have checked the mathematical accuracy against the invoice material that was provided to us.

MR. JULIEN: You have checked it against your lists of incentive credits; right?

MR. MAC CRATE: We have verified the accuracy of these computations. That is what we were able to do.

THE COURT: That is all that you can be expected to do.

Let's see if I can phrase it this way so we have a stipulation: that during the period November 1, 1972 through December 22, 1975 the amount of wholesale incentive credits or allowances shown on Ford's price lists for the crash parts purchased by FLM totalled $236,121.15.

Isn't that basically it?

MR. MAC CRATE: That amount, your Honor, could have been claimed by the Ford franchise dealers.

THE COURT: That is good enough for me.

MR. MAC CRATE: The period, your Honor, that was covered is December 23?

THE COURT: I cut it off at December 22, but that is immaterial.

Mr. Wasser, so we have it in the record, you are telling me that for this period, November 1, 1972 through December 22, 1975 the total of all of those wholesale incentives that you have noted on the invoices amounted to this $236,212.15; is that correct?

THE WITNESS: Yes.

THE COURT: On this Exhibit 1000 there is this column entitled, "Ford Cost." What is that?

THE WITNESS: The Ford cost is the cost of the parts excluding the premium that FLM had to pay, the 5% .

THE COURT: In other words, that is the cost to the dealer who was selling?

THE WITNESS: Yes.

THE COURT: Before taking into account the wholesale incentive allowance; right?

THE WITNESS: Yes.

THE COURT: What is the significance of that for our purposes?

THE WITNESS: Well, it was good for order checking. I was able to check with the books.

THE COURT: You are saying the amount of that was $1,770,520.03 for the time period covered.

Has that been confirmed or not mathematically by Ford?

MR. MAC CRATE: We have no way of doing that.

THE COURT: I don't think that is particularly essential really.

The next column is called, "FLM Cost." I guess that is just what it says; right?

THE WITNESS: Right.

THE COURT: And you are telling me that the total cost of all the invoices for all parts purchased by FLM during this period that we have talked about through December 22, 1975 is $1,858,194.66; is that it?

THE WITNESS: Yes.

THE COURT: And that is total parts or just parts on which the --

THE WITNESS: Total Ford parts.

THE COURT: Not just the ones on which incentive allowances is granted or allowed in the catalogue; right?

THE WITNESS: That is right.

THE COURT: Does Ford confirm that figure or not?

MR. MAC CRATE: We were unable to.

THE COURT: Let's go back to the wholesale incentive allowance.

MR. JULIEN: That is the basic.

THE COURT: The figure of 236 odd we mentioned before carried us to December 22, 1975. What did you with respect to the period subsequent to that date?

THE WITNESS: Since we had the invoices delivered through December 22, we then projected it from December 22 showing the list --

Q December 22 to what?

A I'm sorry. From December 23 to February 6, 1976. We knew the deliveries for the last week of December, which was $2,439 of deliveries, costs to FLM for the remainder of December.

We knew the deliveries for the week of January 5 through January 9 were 19,510. We then for the weeks after that through February 6 we used the same figure of 19,510 coming to a total of $99,993 of FLM purchases of Ford parts from December 23 through February 6. We then multiplied that by the 12.71% which was the percentage of the incentive credits over the entire picture.

THE COURT: You took the ratio of the $236,121 to the $1,858,194?

THE WITNESS: Right.

THE COURT: That is your percentage?

THE WITNESS: Right.

THE COURT: All right.

THE WITNESS: I then multiplied these purchases by the 12.71% and I got $12,709.16. I then added that to the Exhibit 1000.

Q Not to Exhibit 1000.

A To my C-1.

THE COURT: You added to that the $236,121?

THE WITNESS: Yes, and I came to a total of $248,830.31 as the grand total.

THE COURT: I think the way that stands it is basically stipulated as far as the $236,000 and as far as the other $12,709 method of calculation. Ford doesn't stipulate to that and it is just a matter of something for me to find.

MR. MAC CRATE: Nor, your Honor, is there anything in the record to support those figures.

THE COURT: To support what figures?

MR. MAC CRATE: The figures from December 1975 to February 1976.

THE COURT: There is testimony. You can cross-examine.

MR. MAC CRATE: But the witness is talking in

terms of documents that are not here in court, your Honor. This is the rankest sort of hearsay.

THE COURT: Did you give Ford any documents relating to the period December 23, 1975 through February 6, 1976?

THE WITNESS: We didn't receive them.

THE COURT: What?

THE WITNESS: We didn't receive the invoices from the dealers. They were delayed.

THE COURT: Where did you get the figures about purchases that you described to me?

THE WITNESS: We had a record of the deliveries for that first --

THE COURT: What form did that record take?

THE WITNESS: I believe the -- there was a delivery record and the company keeps an accounts payable ledger. The invoices come in some time later.

THE COURT: You gave me a list of figures totalling up to $99,993.36.

THE WITNESS: Yes.

THE COURT: The question is what did you base that on. What documents? Did you do this personally or did somebody else do it?

THE WITNESS: Well, we had a record of the

deliveries that Mr. McKee had supplied to me for that period.

THE COURT: Deliveries by the agencies to FLM?

THE WITNESS: FLM.

THE COURT: For those periods?

THE WITNESS: Yes.

THE COURT: What kind of a record --

MR. JULIEN: He is not saying the entire period. He is saying for the last week in December, I think he said, and the first week in January.

Q Did I have that correct, Mr. Wasser?

A Yes.

Q Not for the entire period?

A No, that period was projected, the rest of it.

MR. JULIEN: So there was the last two weeks of the entire period, your Honor, and he projects the rest by taking the same amount of deliveries for the first week in January and using that for the additional weeks up to and including February 6th.

THE COURT: I don't think he can testify to that. I mean, it is not a big amount but --

MR. JULIEN: I respectfully submit, your Honor, that opinion evidence could be received easily

with respect to all of this, but having had actual figures up to the end of the year, and since there are some six weeks, it surely is within his ability to project the six-week period based upon, first, the same amount percentagewise or the same ratio.

THE COURT: Look, Mr. Wasser, I thought it was a little simpler than maybe it is. Just tell me exactly what you got for the period after December 23, 1975. Go over that again, would you, please?

THE WITNESS: Well, there are records kept by the company of the sales daily and the cost daily, and the invoices arrive sometime later. They are still not in. But we knew that for the period in December there were $2,439.71 of costs.

THE COURT: December 23?

THE WITNESS: Through December 31, and we also knew --

THE COURT: What did you say? How much in cost?

THE WITNESS: $2,439.71.

Q How did you know that?

A There are records kept by the company.

THE COURT: What records?

THE WITNESS: As the deliveries are made and the sales are made they have a cost sheet, cost record.

THE COURT: In other words, they were recording deliveries?

THE WITNESS: And they were also recording the cost of sales for that period.

THE COURT: And that indicated for that period that amount of costs on the sales? Which meant what?

THE WITNESS: Till the invoices arrived this was the only way.

THE COURT: How about after December 31?

THE WITNESS: Yes, for the first week of January the cost of sales, which is the only record they had at that point, was $19,510.73.

Q For what period is that

A January 5 through January 9, 1976, for five days. That was the last record that I had when I prepared this exhibit. I then used that weekly figure to project for the following four weeks through Friday, February 6th.

Q Using the period from January 5 to January 9 you took that as one of the bases -- you applied the ratio to that and you used that for the remaining days up to February 6; do I have that correct?

A Yes, right.

THE COURT: There is one obvious thing and I guess Christmas explains it, but your last week or the

last few days in December of more than a week were $2,439; right?

THE WITNESS: There were many days that the factory was closed.

THE COURT: I'm asking you this: You have this week of January 5 through 9 and that had an amount of about $19,500. Are you telling me you projected the rest of the weeks on the basis of that particular week?

THE WITNESS: At the time that I prepared this exhibit, January 29, this was the only information I had available.

THE COURT: Did you project the period after January 9 on the basis of that January 5 through 9 week?

THE WITNESS: Yes, sir.

THE COURT: You regarded that as typical?

THE WITNESS: Right.

THE COURT: And you did not regard the Christmas time as typical; right?

THE WITNESS: Right.

THE COURT: I will allow cross-examination on that, but that is the witness' testimony.

The percentage was in your final figure.

THE WITNESS: 12.71%.

THE COURT: Is that all you have to present

to the wholesale incentive allowance amount, the $248,000?

THE WITNESS: Yes.

MR. JULIEN: That is it.

THL COURT: Now then, did you wish to present material on this other phase, the loss of profit?

MR. JULIEN: Yes, your Honor.

THE COURT: Okay.

MR. JULIEN: I am going to ask that Exhibit B attached to this sheaf of exhibits, your Honor, be marked for identification.

[Plaintiff's Exhibit 1002 marked for identification.]

Q Mr. Wasser, I show you Exhibit 1002 for identification and ask you to tell us what that exhibit purports to show and following that tell his Honor how it was prepared.

A This exhibit shows the damages due to loss of profit, due to interruption of growth using a growth factor of -- average growth of three years ended 9/30/73. That year, which included Ford's cancellation of incentive credits -- and the exhibit then projects the same two periods after 9/30/73.

Q How did you arrive at the growth factor for the FLM concern?

A I took the percent of increase of sales over the prior year for each of the following three years, physical year ended 9/30/71, which had a growth factor of 15.4%.

THE COURT: May I interrupt?

THE WITNESS: Yes.

THE COURT: I thought I had ruled before and told you that I would not consider, I would not award damages on some presumed growth rate and --

THE WITNESS: There was an actual --

MR. JULIEN: Your Honor is quite right in saying that. I have it both ways. If you also recall, you said that will be my opportunity to make an offer of additional proof.

THE COURT: I don't want to prevent that. I want to tell you that you can have your offer of proof. Make the record in any way you see fit. I thought you had pretty well made your record before. Maybe you are making a little different record now.

What I really want to get to is this item which I brought up.

MR. JULIEN: That is the next one.

Perhaps we could save time, if it meets with your approval, to simply say that I will offer in evidence

this exhibit, the number of which is 1000 for identification, and on the basis that this constitutes the computation made by this witness from the books and records and from his expertise with respect to setting up in accordance with accounting procedures what would be a proper growth factor to employ in making up this exhibit.

THE COURT: All right, that makes your record.

MR. MAC CRATE: I would object.

THE COURT: I will sustain the objection. I think that makes a sufficient record.

MR. JULIEN: Very good.

Now let us turn to Exhibit A which your Honor has.

THE COURT: We will call that Plaintiff's Exhibit 1003 for identification.

[Plaintiff's Exhibit 1003 marked for identification.

THE COURT: Go ahead.

MR. JULIEN: With respect to the previous offer of proof, your Honor, may it be assumed that my proof will also include that I would interrogate Mr. Wasser to the extent that he will establish that it is his opinion that proper accounting methods call for the estimate of damages to be fixed in the method shown in the previous

exhibit.

THE COURT: All right.

Q You have Exhibit A before you, Mr. Wasser, do you not?

A Yes.

Q Exhibit 1003 for identification.

What does that exhibit purport to show?

A This purports to show the damages due to loss of profit, due to interruption of growth using a level basis of sales projection since fiscal year ended 9/30/73, the year which included Ford's cancellation of incentive credits.

THE COURT: I think the record will show this, but Page 28 of my decision noted the fact, as it appeared from the record, that the sales of FLM for fiscal 1973 were $798,947. The estimate of sales for fiscal 1974 was $694, down approximately $100,000 from the fiscal 1973 level, and I indicated reliance on evidence that FLM is suffering a shortage of working capital, and so forth. I'm not talking about loss of growth. I'm talking here about a decline in sales from an achieved level.

MR. JULIEN: Yes.

THE COURT: And it seemed to me, and this I think I went over with you at the time of the informal

conference we had around the 19th of December, that this was more concrete and more definite than discussions of lack of loss of growth based on some kind of projections of growth, and I told you I would be willing on the basis of the record at the trial to award damages -- if you were able to give me the material, I would be willing to award damages for the loss of profit based on that decline in sales.

Now, I hope Exhibit 1003 deals wit that.

MR. JULIEN: It is directed to that, your Honor.

THE COURT: Okay. Let's deal with that, Mr. Wasser.

THE WITNESS: We took the actual sales for the fiscal year 9/30/74, which was $695,188 and then in order to bring it to the date of the beginning of the trial, I made an adjustment for the period from 9/23/74 to 9/30/74. I arrived at a figure of $678,712 for the period October 1, 1973 through 9/22/74. That was $678,712 on a level basis and the same comparison of the sales using the rate of the fiscal year ended 9/30/73 would have be $780,012. The loss of sales for that period was $101,300.

THE COURT: The 101 is the difference between what?

THE WITNESS: The difference between the sales projected on a level basis using the same rate as the prior year as compared with the actual sales for that period.

THE COURT: In other words, you felt concerned to cut this claim off at the commencement of trial; right?

THE WITNESS: I have, your Honor.

THE COURT: That is the reason you adjusted it back to 9/23/74?

THE WITNESS: I have the claim in two parts. The top part is through the beginning of trial and at the bottom I then went over and calculated --

THE COURT: What you are talking about is now through the beginning of trial?

THE WITNESS: Yes.

THE COURT: Go ahead.

THE WITNESS: I then prepared Schedule or Exhibit R where I divided the expenses into two parts, flexible expenses and fixed expenses, because if the sales increased certain expenses would go up based upon the sales, such as purchasing more delivery trucks and telephone expenses, entertainment and so forth.

I then, using that exhibit, calculated the rate of profit, 26.4%, which would have been affected

and multiplied that --

THE COURT: Which would have been effected on what, on sales?

THE WITNESS: Which would have been effected as a net profit rate on sales.

THE COURT: Of 101,000?

THE WITNESS: Yes, and increased amount of 101,300. I didn't take the entire rate. I excluded the flexible overhead rate.

Q And that figure was what?

A 26.4% times 101,300 comes to 26,743 which would be the net profit excluding flexible expenses on these lost sales of 101,300.

Q So, to what period --

A This is for the period from October 1, 1973 through September 23, 1974.

Q What did you do after that?

A Then after that I projected the schedule to the periods after 9/22/74.

THE COURT: Let's stick to the first part. You have got Exhibit R here. Let's have that marked. That would be Plaintiff's Exhibit 1004 for identification.

[Plaintiff's Exhibit 1004 marked for identification.]

MR. JULIEN: Three pages, your Honor.

THE COURT: All right.

THE WITNESS: Should I proceed?

THE COURT: Do I have a copy of R?

THE WITNESS: Do you have a copy of R for the Court?

MR. JULIEN: Yes.

THE WITNESS: Exhibit R, in addition to dividing the expenses of the two categories, then has on Page 3 the calculation of net profit rate.

THE COURT: I just don't understand this Exhibit R and I would appreciate you going into that, if you would.

THE WITNESS: Yes, Exhibit R starts with a rate of 33.5%.

Q Tell us, first, what you are doing in that exhibit.

A I'm reducing the gross profit that existed in the fiscal year 9/30/72 to the net profit rate which would apply on sales.

THE COURT: Fiscal 1972?

THE WITNESS: We had to start with that, fiscal 1972, your Honor, because we then adjusted it with the parts that were included. For example, the 33.5%

included the incentive credits which we didn't have after that fiscal year. I adjusted the incentive credits for the decline of rate from 17.2% to 12.4%.

THE COURT: Mr. Wasser, I don't understand you. Between you and Mr. Julien -- if you are going to recover on this, I've got to understand it. Somehow can you maybe help me out, Mr. Julien?

MR.JULIEN: Yes, I think perhaps by dialogue we can get it a little better.

THE COURT: All right.

Q In this exhibit 1003 you were attempting to get a base against which you were going to assess loss of profits for the period involved in this suit; is that right?

A Yes.

Q First tell us how you got your base.

A The base was a gross profit rate.

Q Yes.

A Of 33.5% which was the last normal year, if I may use that term, and the fiscal year ended 9/30/72 of 33.5% being the gross profit on sales.

Q All right.

A The gross profit before expenses.

Now I did not --

THE COURT: That is right. I have that in my decision and that is okay. We are at least starting where I can recognize it.

THE WITNESS: I then had to adjust that gross profit.

THE COURT: You are looking at Page 3 of this exhibit, 1004?

THE WITNESS: Yes, your Honor.

THE COURT: All right.

THE WITNESS: I then decided that I could not use the 33.15% because certain things were different.

Q Can I paraphrase to see if I'm correct?

A Yes.

Q The reason you didn't use that percentage was that there would be some items of expense incurred if the additional sales that you talk about had been had by FLM; am I correct?

A That is one part.

Q Is there another part?

A The other part was the declining of the incentive credit rate which I found was 4.8% on average.

Q Would you tell us how that makes the difference?

A Well, it would reduce the gross profit. If FLM had received the incentive credit the gross profit

would be 30.5% instead of the 33.5.

THE COURT: That I don't understand.

THE WITNESS: Your Honor, in the 33.5 we had 4.8% higher incentive credit of sales -- I'm sorry -- purchases. The rate had dropped from 17.2 to 12.4, so to give a fair picture I took the 4.8% decline of the incentive credit rate on purchases and multiplied it by the amount of Ford parts without the premiums that were paid by FLM.

THE COURT: In other words, the gross profit for 1972 was figured on the basis -- not figured on the basis, but it took into account a particular rate?

THE WITNESS: Right.

THE COURT: Of wholesale incentive credits which they were getting at that time?

THE WITNESS: Right.

THE COURT: You have concluded on the basis of the gathering of the information for the period after fiscal 1972 that the percentage of wholesale incentive allowance credits would have declined?

THE WITNESS: Right, at 4.8%.

THE COURT: And so you made that adjustment in reducing gross profit from what it was in fiscal 1972; right?

THE WITNESS: To fiscal 1974.

THE COURT: All right.

MR. MAC CRATE: Can we fix the time of that decline, your Honor?

THE WITNESS: Yes, I have a footnote on the bottom of Page 3 showing that -- of actual folders found of invoices and found that in the 13 months before the cut-off of incentive credits for the period October 1, 1972 to October 31, 1972 there was a 17.2% incentive credit rate on Ford parts purchased. I then found --

THE COURT: The wholesale incentive allowances versus the prices paid by FLM; right?

THE WITNESS: Yes, and this was included in an exhibit previously submitted to the Court.

THE COURT: I don't think that is in evidence.

THE WITNESS: And in August 1974 we found that the rate was 12.4%.

THE COURT: And for the overall period from November 1972 through December 1975 the ratio was 12.71% so --

THE WITNESS: Yes, your Honor, to be conservative I kept the 12.4%.

THE COURT: I understand that.

What other items did you use for adjustment?

THE WITNESS: I then decided that if the sales were higher certain expenses such as entertainment, telephone, postage and trucks, auto expense would go up. Certain expenses would not go up until they hit maybe a million and a half such as rent, accounting fees, and salaries that they now had.

Q Those that would go up you called flexible overhead expenses?

A Yes.

Q And by employing them you diminish, do you not, the profit that you claim would come from these additional sales?

A Yes, I deducted that from the rate. I then arrived at a rate of 26.4%.

THE COURT: I'm still on your last page of Exhibit 1004 and we had this decline in wholesale incentive credits of 4.8%, and then the next item I thought was the cost of goods sold.

THE WITNESS: The 4.8 was reduced to 3 multiplied by four parts. In other words, there was three per cent off the sale. The 4.8 was on the purchases.

THE COURT: I've got to just understand it. How did you get down to a 3% from a 4.8%?

THE WITNESS: The 4.8% represents the cost of

goods sold, which was 6.5% multiplied by the Ford parts portion of that cost, which was 92.56%, excluding the premium that FLM paid. These were the dealer costs.

THE COURT: I think the record is reasonably intelligible through your explanation of 4.8%. It is not too intelligible after that.

THE WITNESS: The 4.8 is based on cost. The 3% is the amount on sales.

THE COURT: When you say the 4.8% is a decline in wholesale incentive credits expressed in terms of a percent, then you've got a figure of which you take the percent of; is that right?

THE WITNESS: Percent of cost.

THE COURT: You don't just subtract 4.8% from a gross profit figure; right?

THE WITNESS: No, your Honor. I have to get it back to the sales.

THE COURT: You have to figure out how much it affects the gross profit?

THE WITNESS: On sales.

THE COURT: How do you do that?

THE WITNESS: I took the 4.8% and multiplied that by the cost of goods percentage -- costs of goods sold percentage of sales.

THE COURT: And the cost of goods percentage of sales would be the difference between the gross profit of 33.5 and 100; right?

THE WITNESS: Yes,your Honor. I think that came to 66.5%.

THE COURT: Why do you multiply 4.8 times 66.4?

THE WITNESS: Because that would be the importance of the 4.8% which would affect the sales, the percentage of sales. I have to get it back to the gross profit on sales. It is almost like saying that you remove one-third. It comes pretty close to that, but this exhibit shows the actual calculation reduced to the Ford parts portion of the cost.

THE COURT: I surely don't understand it.

Q Do I understand correctly that you start off with a gross profit of 33.5?

A Yes.

Q And then because there are certain allowances which have been paid from an accounting standpoint you ultimately bring down that gross profit margin to 26.4?

A I bring that down to 30.5. The 26.4 is after deducting flexible expenses, the net profit rate rather than the gross profit rate.

Q So that ultimately on these sales which were not had, which are claimed as a result of the decline FLM did not enjoy, you charge against them in order to arrive at your profit a figure of 26.4%?

A Right.

Q Rather than your original gross profit figure of 33.5%?

A Yes.

Q In arriving at 26.4 rather than the 33.5 there were certain things which you disallowed your client?

A Yes.

Q Just tell us what were the things you disallowed your client?

A I disallowed two things: One, the decline of the incentive credits on the sales. I found that to be 3.0% of sales, and 4.8% of Ford parts purchased, so the 3.0% came off the 33.5.

I then deducted 4.1% for the flexible expenses which represented the total on Page 2, the right-hand column showing flexible expenses of 28,313 in the fiscal year ended 9/30/74, divided by the sales of that fiscal year. The fiscal year 9/30/74 was accepted by me since it was the middle of the entire damage claimed.

Dividing the flexible expense by the sales I

arrived at 4.1%. I then took the 4.1 off the 30.5 because these expenses would be incurred if the additional sales had been made.

Q The result of all this calculation as shown in Exhibit R, which is part of 1004 -- is it 1004?

A Part of R, yes.

Q Yes, 1004, is to bring down the margin of profit from the original gross profit margin of 33.5 to 2.64?

A Yes.

Q And then do you take that 2.64 as the percentage which you employed in Exhibit 1003 in calculating the loss to the client as a result of the diminution of its sales?

A Yes.

Q And as a result of -- what figure do you apply that 26.4 to in arriving at the net loss to the client?

A Well, I applied that against the amount of sales which were less than the sales of the fiscal year ended 9/30/73.

Q For what period?

A I applied it to two periods: first to the period October 1, '73, through September 22, '74.

Q And using that 26.4, what figure did you get for that period?

A 26,743.

Q And then you applied the same percentage to a subsequent period?

A Yes, for the period 9/23/74 through February 6, '76.

Q And there you claim a loss of what amount of sales?

A 17,993.

THE COURT: I don't understand how you got the --

MR. JULIEN: Can I back up a moment,your Honor?

THE COURT: Yes, please do.

Q This last question I think you misunderstood. What was the amount of sales from the same period, from September 23, 1974, to February 6, 1976? Amount of sales that you claim were lost?

A Yes. This includes some estimates for the

most recent period.

Q Well, first give us what our actual figures are, and then we will talk --

A The American sales loss -- well, I have -- the actual figures are listed by month. Do you want the --

Q Just give us the parameters, the outside parameters, from when to when.

A From September 23, '74, through September 30, '75 --

Q Actual sales were?

A $722,681.

Q And applying that to the level basis for the year which you employed before?

A It was $817,882.

Q Showing a loss of sales in what amount?

A Of $95,201.

Q Those are actual figures, are they?

A Yes.

Q Then did you project for a certain period?

A I projected through February 6th. From October 1, '75, through February --

THE COURT: What does the figure, the 95 what?

THE WITNESS: The $95,201 was a difference between the level basis of sales for the period of September

23, 1974, through September 30, 1975, which was $817,682, as compared to actual sales of $722,681.

Now, beyond September 30, 1975, I had used estimates.

Q Did you mean to say beyond September?

A Beyond September 30 of 1975 --

Q Yes?

A -- I used actual figures of October, November and December; then beyond December 31, 1975, I used estimates.

Q In what manner did you arrive at the estimates from the period beginning January 1, 1976, to February 6, 1976, so far as lost sales?

A These were just based upon -- from January 1, 1976, to February 6, 1976, they were based upon estimates of the sales.

Q How did you arrive at that estimate?

A Based upon consultation with Mr. McKee and examining the records of the company through part of January.

Q Can't you tell us more about that? What basis did you employ for making an estimate of what the sales would be during that period from January '76 up to and including February 6, 1976?

A Well, from January 1 there were only one or two days left in the month, so we estimated it, and this estimate is very close to the actual figures.

Q Excuse me. Did you have actual figures for all of the month of January, with the exception of the last two days?

A Yes.

Q You had that?

A Yes.

Q You used those actual figures?

A Yes.

Q Up to what, January 28, 29?

A Yes.

Q Then you estimated the last two days and the first week in February?

A I think it was one or two days remaining at that time.

Q What did you use for your estimate?

A For the first week of January we used five -- there were five working days -- 21 working days in January, and there were five working days in the first week of February. We used five 21's times the January figure, to arrive at the sales for the first week of February.

Q Does this exhibit show us the amount of lost

sales for that period, excluding that period for which you made a projection or estimate, that is, up to the end of December of 1975?

THE COURT: No, it does not.

A No, it doesn't.

Q It doesn't.

A But I can --

Q Can you do that for us?

A I can do that in five or six minutes.

THE COURT: What you are saying is that if you took what you call a flat level, flat being the level for the year ending September 30, 1973, if you took that level all the way through February 6, 1976, the difference between that flat level and what actually occurred was $68,156.

THE WITNESS: Yes, your Honor.

THE COURT: Wait a minute. That is wrong. If you took it from --

THE WITNESS: September 23.

THE COURT: -- for fiscal 1974 -- if you took it for the period of fiscal 1974 up to the beginning of trial, the difference between the flat level and what actually occurred is $101,300.

THE WITNESS: Yes.

THE COURT: We have covered that.

THE WITNESS: Yes.

THE COURT: Carrying it on from the beginning of the trial up to the present time, basically, the rest of that --

THE WITNESS: Is 68,000.

THE COURT: $68,156. So apparently at some point the sales began to improve beyond the fiscal 1974 level, didn't they?

THE WITNESS: Yes.

THE COURT: Because for a year and a half approximately -- maybe not a year and a half -- but a year and a few months the so-called loss compared with a year's loss of 101,000.

THE WITNESS: Your Honor, I investigated that, and I found that the price of the parts had gone up approximately 20% in one year's time, and in January of 1976 and shortly before that there were new models introduced by Ford which had a higher price tag on the parts.

THE COURT: Whose prices were up?

THE WITNESS: The Ford Motor Company's prices.

THE COURT: Therefore FLM's prices --

THE WITNESS: FLM's percentage.

THE COURT: All right.

MR. JULIEN: I would like to follow that point while your Honor has initiated it.

THE COURT: Yes.

BY MR. JULIEN:

Q So that these increases in prices of both Ford and FLM to its customers, this increased the dollar volume of sales --

A Yes.

Q -- at some point?

A Yes.

Q And that particular point was when?

A It fell into the period, to a very great extent, of October 1, 1975, through the February 6, 1976 period.

Q So that this dollar volume of sales, abetted as it was by increases in price, did not reflect more volume - sales, did it?

A No, there were no more units sold by the company.

MR. JULIEN: I will have more proof, your Honor, through another witness as to what happened at that time.

THE COURT: All right.

MR. JULIEN: What is your Honor's pleasure?

THE COURT: Have you finished examining Mr. Wasser?

MR. JULIEN: No, not yet, sir.

THE COURT: All right.

MR. JULIEN: Just bear with me for a moment, please.

Q On this last exhibit, 1003, as a result of applying this margin of profit of 26.4 to the sales lost during the period shown in this exhibit, did you come to a calculation of what the profit lost to your client had been as a result of those lost sales?

A Yes. For the period September 23, 1974, through February 6, 1976, the figure came to 17,993. Added to the period up to the date of trial, the combined totals came to 44,736.

Q Wait a minute. You used the same expression twice. Did you mean added to the previous figure of September 30, 1973, to September 30, 1974, of 26,000?

A September 23, 1974.

Q And that was 26,743?

A Yes.

Q Making a total of $44,736?

A Yes.

Q $44,736.

MR. JULIEN: Just in the event there is any confusion about the margin of profit employed here, the percentage of 26.4, rather than 33.5 -- does your Honor

have any question on that subject?

THE COURT: No, I don't think I do. I will tell you, I have a problem of time.

MR. JULIEN: Please tell me what it is, sir.

THE COURT: We were set to go at three o'clock on Friday, and I think we might have finished by the end of the day. I understood you could not make it until --

MR. JULIEN: I was ill, your Honor.

THE COURT: And then this afternoon you could not make it until four. And I am afraid I have to leave pretty close to 5:30. I just am sorry. Obviously we cannot finish. Mr. MacCrate has to cross-examine Mr. Wasser. I imagine you want to put on Mr. McKee.

MR. JULIEN: I have some additional direct on proffers of proof, with respect to which I will be interrogating Mr. Wasser too, items of which --

THE COURT: I think we have accomplished a lot even in this short time to get that wholesale incentive, those figures out of the way, because that is the major effort. But obviously -- what do you want to cover with Mr. Wasser?

MR. JULIEN: I want to get out some proof, or an offer of proof, on the obsolescence credits, your Honor, and on the --

THE COURT: I tell you what: I think you have that in the earlier record. It may not be up to date, but at least on the point --

MR. JULIEN: At the point. But I was going to foot it up with actual figures.

THE COURT: I think that is kind of a waste of time. In other words, if it goes up to the Court of Appeals and they reverse me, I think there is an ample record. The question is one of law, it seems to me; it is not one of calculation. It is one of what I call proximate cause.

MR. JULIEN: Well, may I say this, Judge --

THE COURT: And so I don't want to prevent you from making the record you need, but frankly the reason I am rejecting that and a group of other claims is not because your figures -- I am not quibbling with your figures; it is because I would hold, as I indicated at the first trial, that just as a matter of causation it seems to me that whether the new dealer is willing to share the obsolescence credit with FLM is a matter of negotiation between FLM and that new dealer. Ford did not cut off the obsolescence credit. We talked about this before.

MR. JULIEN: Yes. I am aware of your Honor's position on that.

THE COURT: So that is my position. I don't know particularly why you would have to have more figures in the record.

MR. JULIEN: I would simply say this, your Honor: When we do get to that, at whatever time your Honor fixes for us, it will be so brief, as it was with respect to the other item that your Honor rejects, that all I want is a complete record, so that in the event I should be successful up above that the Circuit Court would not have to send back for some more kinds of hearings but could look through the record and add to my damage.

THE COURT: All right. What do you want to do now? We could just take another few minutes.

MR. JULIEN: My associate makes a suggestion which perhaps will lie well with your Honor. Another matter that you are going to take testimony on deals with the attorneys' fees, if there is a desire to take testimony with respect to it. Would it be in keeping with your Honor's program if they desire to examine any of the lawyers with respect to their fee allowance applications, perhaps that could be done by deposition and we could save some time for you.

THE COURT: We ought to figure out a way to get this record closed.

MR. JULIEN: Yes. I want to do that.

THE COURT: Unfortunately it seems to me we are just about an hour short this afternoon, but I wanted you to come in and at least get started.

As far as I am concerned, I have got some time this week, but I understood you were in a bind this week.

MR. JULIEN: I am available, your Honor.

THE COURT: To take depositions about fees, that is going to take a lot of time, transcripts and so forth.

MR. JULIEN: I can be available. Any time you fix I can make arrangements for this week now.

THE COURT: All right. Mr. Julien, let us forget the fees for a minute. Are you through with Mr. Wasser except for these offers of proof on which I am not going to allow damages?

MR. JULIEN: I think, with the exception of proffers of proof, your Honor, that will suffice with respect to this witness.

THE COURT: Do you want to put Mr. McKee on, did you say?

MR. JULIEN: Yes.

THE COURT: What is he going to testify about?

MR. JULIEN: He is going to testify to the very period that your Honor made inquiry of concerning the

element of the apparent improvement in sales, and he can show that there is not truly an improvement at all. All it means is more dollars for the same items.

THE COURT: So he is going to testify factually about your damage claims.

MR. JULIEN: Yes.

THE COURT: I take it you want to cross-examine Mr. Wasser, right, Mr. MacCrate?

MR. MacCRATE: We do, your Honor, and I would also like an opportunity to move to strike Exhibit 1003 and 1004 for a complete lack of proof as to any causation for the claimed loss due to the withdrawal of the wholesale incentive.

THE COURT: We are not going to have motions to strike. It goes to the weight, and you can present whatever proof you want, and then you can cross-examine and so forth.

As far as your proof, you want to cross-examine Mr. Wasser, and I take it you will want to cross-examine Mr. McKee.

MR. MacCRATE: Yes.

THE COURT: Are you going to put on proof on this point?

MR. MacCRATE: I believe, your Honor, it is

basically a failure of proof on the part of the plaintiff, so that I cannot anticipate --

THE COURT: That is up to you. If you don't want to put anything on, you don't have to put anything on. I am not urging it. So that it will be the end of that. We will just have a little cross of Wasser and a little cross of McKee.

On this question about the attorneys' fees, you suggested, Mr. MacCrate, having a hearing. How extensive a hearing do you think is in order?

MR. MacCRATE: We have subpoenaed, your Honor, a number of items of information, both from Mr. Wasser and from the firm of Julien & Schlesinger. We have received very, very scanty response to our subpoena. There is a very extensive examination --

THE COURT: When did you serve your subpoenaes?

MR. MacCRATE: We served the subpoenaes last Wednesday.

MR. JULIEN: It is not a question of time, your Honor. That is not the question.

MR. MacCRATE: And there has been a substantial withholding of information on this, and there are very substantial factual issues that are raised by an exhorbitant claim for fees.

THE COURT: I read your papers. We are at the point where we are having a trial, and on attorneys' fees you can have discovery, you can have depositions, you can do anything that is in order. But I don't like to start the process now. We knew we were faced with this commencing with December 19. In an antitrust case I tried last summer, before it came to the hearing on the fees, well in advance of the hearing the losing party had taken the deposition of the attorneys on the other side. We came into the hearing on fees, I had all the material, and it was over with. Apparently here we are starting discovery.

MR. MacCRATE: Your Honor, there was no petition until the other day. I cannot move on these matters until there is a request, just as there has been no supplementary complaint. The same thing with respect to the petition. I am hamstrung as to doing any discovery until I get that.

THE COURT: I think I could figure out a way not to be hamstrung. If you want to take depositions, you could take them. You know that people are going to apply for fees. If you want information, you can take a deposition. It was done last summer by other lawyers, and they were all ready. Now nobody is ready on this thing.

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Now we have a statement that a subpoena was served last week and it has not been complied with. What do we have to do to bring this to a head? What do you suggest?

MR. JULIEN: May I make a suggestion, Judge?

THE COURT: All right.

MR. JULIEN: I am not protesting the time on that at all. We have given Mr. MacCrate everything with respect to this with one single exception. He has asked for diaries of myself and diaries of Mr. Wasser containing a good deal of confidential information. We have given him the dates upon which work has been done with respect to this case, the hours spent upon it. But when he goes into my personal diary and goes into Mr. Wasser's personal diary, in which there are entries not alone with respect to this case but any other cases, and even with respect to this case there are entries which are confidential, having to do with conferences with Mr. McKee and others that we certainly don't want to make available to him, that is why --

THE COURT: I think I was being unfair to Mr. MacCrate in expecting him to move. You filed your petition when? I guess it was filed in court February 6th.

MR. JULIEN: January 30, your Honor.

THE COURT: January 30. There is not much he can do before then, but we have got to now figure out a way to get this over with. I want to tell you, Mr. Julien, that I have to have a way to do this. I have to have a way to delineate in some sensible way -- and it cannot be precise, I know -- but I have to have a way to delineate the problem.

No. 1, to the extent that separate time was spent on Sherman Act claims, in legal research or in whatever way, I will not allow a fee on that.

Second, to the extent that separate time was spent on damage claims on which you did not succeed, I will not allow a fee on that.

To the extent that time was spent seeking a preliminary injunction which did not succeed, I will not allow a fee on that. I will not allow a fee on negotiations with the FTC beforehand.

Those are all things on which I am in accordance with Mr. MacCrate respecting my understanding of the law. If you want, you can certainly charge a fee, but you have got to bill FLM, you cannot bill Ford Motor Company. In other words, in a very general way the law is that you have a right to get a fee only for the successful damage claims under 15 U.S.C. 15.

How one delineates I don't know, but at least there can be the effort to do it, and I am sure there must be a way, with all that legal research, there must be some notation, of whether it was on the Sherman Act or on the Robinson Patman Act. At least in terms of the papers in your brief, I have got to do something to attempt to delineate that.

I disagree with Mr. MacCrate in chopping off something like half for the injunction. I don't imagine that as far as seeking the final injunction in the case there was probably any special effort, except for drafting an injunction. It probably did not take much time. I don't think there would be any special effort devoted solely and exclusively to seeking a permanent injunction. But on the other things -- I hope you are making notes -- Mr. MacCrate is entitled, I think, to have the delineation between the successful and unsuccessful damage claims, and there has got to be some effort at least on the part of the plaintiffs' attorneys to show what amount of effort was spent on successful damage claims.

MR. JULIEN: Judge, before -- I am sorry, I don't mean to interrupt.

THE COURT: Again, you know, I am not expecting something unrealistic, but the effort has to be made,

because that is all you can get. The rest you have got to get from your client.

Also we have got a difficult problem because of the involvement of Mr. Wasser and then you, your firm, Mr. Julien, and I have got to be concerned about whether there is a duplication of effort. The Ford Motor Company is not supposed to pay for duplication of effort.

Finally, this question of paralegals and accounting work. I am sorry to say that I am not completely clear on that as far as the law is concerned, and I don't think the law is all that clear, at least in this Circuit. The way I would read the statute it reads -- I don't know where this is quoted in the briefs, and I should have the statute here --

MR. JULIEN: We have it, Judge.

THE COURT: Where is it?

MR. JULIEN: It is 15 U.S.C. 15. There are so many annotations, I cannot get to the law. Here it is [handing to the Court.]

THE COURT: The statute says: "...and shall recover threefold damages by him sustained and the cost of suit, including a reasonable attorney's fee."

I think if you just read the statute and you look at some authorities, like Professor Moore, it would

appear that the cost of suit would be a rather all-embracing term, not just technical costs like filing fees. And when it says "including a reasonable attorney's fee" it is something embraced within cost of suit. I don't understand particularly a reading which would exclude accounting work, paralegal work, and so forth. I would think that you would be entitled to the cost of suit, all the things that embraces, one element included therein being a reasonable attorney's fee.

I have got to do a little more looking at the law on that. I just don't know at the present moment. But that does not raise a particularly difficult problem on the record. You will put into the record the cost of the accounting work, the cost of paralegal. But on paralegal you cannot just put in so much. I think it is very definite you have to put in the actual cost of what they got. Right? So that is another little difference. You can certainly get into the record the actual cost of your disbursements, your payment to accountants, payment to paralegals. Whether you can get all that is a question of law, and frankly I don't know definitely at this point.

MR. JULIEN: There are other questions of law which your Honor has alluded to, which I hope you have

not any fixed opinion on at all, because I wish to be heard with respect to it.

THE COURT: Oh, yes.

MR. JULIEN: For example, I don't for a moment agree that in an action where there are several predicates of liability -- to take the simplest situation, where if I had an action involving a breach of warranty and a cause of action for negligence and one for strict liability, that it would be possible to sever and compartmentalize that effort which I put into that.

THE COURT: Mr. Julien, I agree. I am just saying this, that any time you spent on successful Robinson Patman Act damage claims I think you are entitled to recover. If there is separate time spent on Sherman Act which does not overlap, separate time spent on obsolescence credit that does not overlap, if we can arrive at that either by calculation or estimate, Ford is entitled to have that out.

Do you understand what I am saying?

MR. JULIEN: I understand what you are saying.

THE COURT: If it is separate time. If it overlaps, it is my view you get it because you are spending it on the successful Robinson Patman Act claim and you are entitled to get it. If your time relates to something

else by chance, I am not going to cut it in half or a third.

MR. JULIEN: I don't understand that to be the law.

THE COURT: What?

MR. JULIEN: I don't understand that to be the law.

THE COURT: I think it is the law.

MR. JULIEN: That is why I want you to keep an open mind. Because now that you have made it plain to us, we certainly intend to give you law and argument to the effect that if you have a cause of action founded on several liabilities, the fact that the Court selects one of several upon which to place its verdict in your favor does not mean that you may not be compensated as an attorney's fee from the defendant in a case of this type from the work spent on those other elements which were ultimately rejected by the Court.

THE COURT: All right. I don't think you are right.

MR. JULIEN: Think about it, because we will have more --

THE COURT: When we gather together again, we have got to get the record of evidence finished.

First of all, I don't know what your records are. I don't know whether your times show work done on Sherman Act.

MR. JULIEN: Of course not. They do not.

THE COURT: Maybe they don't. But let us see what they show. You would go back with this in mind, please.

MR. JULIEN: Yes.

THE COURT: Because I think everybody is entitled to have the record as clear as possible.

MR. JULIEN: We have this problem on confidentiality. It is not in our worksheets. This is in our diaries. Mr. Wasser records conversations with his clients and conversations with others, and there are other cases, because I keep it page by page; that does not reflect whether I am going on injunction or Sherman or Robinson Patman. All it says is that I am working on the case. But there are matters in it which are confidential which I don't think ought to be revealed to the other side.

THE COURT: It is not confidential whether you worked on the Sherman Act or whether Mr. Wasser worked on the Sherman Act or what he worked on in connection with his fee application.

MR. JULIEN: That does not --

THE COURT: Advice to him, such as your assess-

ment of the merits of the action, of course is not to be produced.

I am just saying to you, Mr. Julien, that this is a very substantial fee application, and this is not so little a lawsuit unto itself.

I think you have got to take the trouble to go back and try to delineate the subjects of work if possible. I think you have got to go back and, in doing that, you have got to go through the diaries and, to the extent that they help on the question of what work was done and on what subject, the diaries have to be produced. If they contain references to actual advice or they contain references to other matters, the substance of the advice of course is privileged and I don't think that would help us one bit.

How do we get the work done to finish the record on this attorney-fee thing? I think on the damages we just need a little more time, but I don't think that is a problem. But the fee application apparently is pretty incomplete now.

MR. JULIEN: I am afraid in some form counsel is going to have to have oral testimony. Because I don't want to mislead the Court, I tell you in advance that neither Mr. Wasser's records nor my own will assist in any

way in compartmentalizing this work.

THE COURT: It may not.

MR. JULIEN: It simply was not done.

THE COURT: That is understandable. I don't say that it has to be in any regard.

Let me hear from Mr. MacCrate. What do you say? How can we get this fee application thing finished?

MR. MacCRATE: On the point you touched on a moment ago, your Honor, with respect to the accounting fee, I would simply invite the Court's attention to Twentieth Century Fox v. Goldman, 238 F. 2d 190 at 224, which is cited at Page 12 of our memorandum.

THE COURT: I know there are indications in the Circuit. I know that is certainly a question.

MR. MacCRATE: I also would, on the same matter, invite the Court's attention to the fact that we need a break-out as to the accounting costs that related to the computation of the wholesale incentive, and this goes to the very question of how much this plaintiff can claim it was injured. To the extent that the accounting costs of $46,000, as represented by the plaintiff at this time, relate to the computation of wholesale incentive, that was a cost that would have been sustained by this plaintiff in order to claim wholesale incentive on the

basis that it says that it was claiming, and therefore would be a deduction from any recovery of wholesale incentive that it could possibly have received netted through to it --

THE COURT: Wait a minute. In your trial brief -- and I will quote you your language -- in your post-trial brief, Page 92:

"Were liability to be found, defendants submit that the only damages which could be recovered by plaintiff would be the precise amount of any additional wholesale incentive allowance which would have been payable to a franchise dealer selling parts to FLM after November 1, 1972, had FLM been an eligible customer during that period."

I have taken it, and I think I am reasonable in taking that, as a concession that --

MR. MacCRATE: No, your Honor.

THE COURT: -- that as long as they prove that precise amount, they get it.

MR. MacCRATE: That is not a concession by the defendant, your Honor.

THE COURT: All right.

MR. MacCRATE: It is simply a statement that that is the only amount that could be shown as a starting point for the computation of damage. It still is something

that would have been paid to a Ford franchise dealer, not paid to FLM. And what would pass through to FLM is an issue on which there has been no proof.

THE COURT: What do you mean "what would pass through"?

MR. MacCRATE: What the Ford franchise dealer would pass to FLM was up to the franchise dealer.

THE COURT: I will pass that for a moment. You are on another subject. But on this question of the cost, the cost to accountants to go back now, after the fact --

MR. MacCRATE: It is easy.

THE COURT: -- and dig through boxes and look at old price lists and so forth, how that would compare with the cost of getting the figure up at the time, I don't know.

MR. MacCRATE: It is all done at one time, your Honor, rather than doing it periodically, getting everything out, doing all the computations. This is just taking the matter and running through with one series of computations.

THE COURT: And another thing, they did offer to do this in a statistical manner much more simply. This whole process could have been avoided if you had agreed to accept a statistical method. You did not have to.

But they have gone to this work to satisfy your request.

MR. MacCRATE: Which is no more than they would have gone through, your Honor.

THE COURT: Anyway I don't see why we have to stand around here tonight and argue about that. If you want to put on proof, you want to cross-examine about what would have been the cost of claiming that wholesale incentive allowance back there to try to reduce those damages, you are welcome to do it, you are welcome to do it.

MR. MacCRATE: I submit the best evidence is what they claim is their cost of making the computation, your Honor.

THE COURT: You can argue that, you can argue that. Just argue it.

But I want to get back --

MR. MacCRATE: On that page of our trial memorandum, your Honor, I would like to invite the Court's attention to what we have to say on this subject at the bottom of Page 92, which I think accords with my representation.

THE COURT: "It would be a simple ministerial task to determine the exact amount." Well, that was your statement. You told them it was a simple ministerial

task, and they went and did it.

MR. MacCRATE: And they claim, your Honor, it was a $46,000 accounting job.

THE COURT: I guess you were wrong in your brief. It was not such a simple ministerial task. You were overly optimistic.

MR. MacCRATE: And this is indeed an indication of the difficulty.

THE COURT: You know, this is all nice tactically, to get it down to every dollar you can, but the point is that I want to focus for a minute on the attorneys' fees. How do you recommend getting this record closed on the attorneys' fees?

MR. MacCRATE: I would invite attention to the remand in the Lind case, where a detailed presentation was made by the plaintiff's attorneys, and then there is a basis upon which the matter can be presented to the Court.

But I think that it is within the power of the plaintiff; it is not something that defendant can do.

MR. JULIEN: I think we have done that with respect to setting forth the times that we have worked on this case. We have done that already.

THE COURT: I have heard more fee applications

than I would like to even mention, and I have never heard a statement like yours. People come into this court, they segregate issues, and they don't just say, "We don't like it, there isn't enough." We don't spend a lot of time on fee applications. We spend time on issues that are worth litigating.

MR. MacCRATE: Your Honor, this is a $450,000 claim.

THE COURT: I don't care. I have had claims bigger than that before, lots of them. But nobody just sits around and says, "We have got to do a lot more work" in general terms. On a fee application, just as in any other piece of litigation, there are issues that are worth fighting about and there are issues that are not worth fighting about. The lawyers work together to figure out a way to limit the activity and the time and the labor to the things that are worth laboring about.

You did a very good job on the phase of the matter about the wholesale incentive allowance, that $236,000. You had your accounting people apparently go over that, we spent about two minutes on that, or whatever time we spent on it, which was my fault. It was almost nothing that was needed to be spent.

On the fee application, if there is an issue

as to the total amount of hours, if that is false, fraudulent, it ought to be uncovered.

MR. MacCRATE: There is an issue on that.

THE COURT: If there is an issue --

MR. JULIEN: You say it is false and fraudulent?

THE COURT: If there is an issue about the rate -- there are some rates mentioned by these lawyers -- if that is inflated, we can have some proof on that.

I think, frankly, that the issues here are what I talked about. I think the issues here are the delineation of work as between different elements.

Mr. Julien disagrees with my propositions as a matter of law.

MR. JULIEN: That we can work out.

THE COURT: But as far as the factual record, I am quite convinced that it is worth developing to the extent it can be. If there is an issue about whether time was spent wastefully, that can be gone into. But there are ways to get that going, so that when we come together at the next hearing there are two or three things that are in contest, and the issues are limited.

I can tell you -- I am repeating it -- that that is done time after time after time. We just don't have a statement by defense attorney getting up and

saying, "They haven't made enough of a presentation," because that does not mean anything. How much of a presentation is needed? What is really at issue? The defense attorney can take a deposition if he wants it, although that is a little time consuming. "I question the amount of hours. I question the amount of time spent by Mr. so-and-so. It seems to me excessive."

They go right down and they specify their complaints Because really when an attorney has a bunch of time sheets and a number of hours, I don't assume it is all fraudulent until it has been proved otherwise.

MR. MacCRATE: Your Honor, this morning at eleven o'clock we received the first backup information. We have not had a chance to go through that and analyze it. But I find, for example, time spent in the enumeration of individual counsel that exceeds virtually the waking hours of the day on some occasions.

MR. JULIEN: That is what happened.

MR. MacCRATE: And I think that we have to go through this and analyze that. I would like an opportunity to do it.

So far as Mr. Julien's representation that there has been a complete response to our subpoena, this is completely misinformation that has been provided to

Mr. Julien. I understand his unavailability and he may not know, but a substantial amount of material we requested from Mr. Wasser that has not been produced. If the way to bring this to a head is to have a deposition of counsel before we bother your Honor again with it, we will certainly go forward with that. I would invite counsel to arrange a convenient time when we could pursue a deposition.

THE COURT: What do you feel has not been produced? The diaries?

MR. MacCRATE: Your Honor, I hand up the copies of the two subpoenaes that were served, and the schedule annexed to each indicates the material that we were requesting.

THE COURT: Let us take the subpoenaes served on Julien & Schlesinger, Exhibit A. Is there any objection to any of this?

MR. JULIEN: The only objection I voiced with respect to diaries, your Honor, has been talked about.

THE COURT: I think you have got to produce --

MR. JULIEN: We don't keep time sheets, we don't keep blotter entries, whatever that might be.

THE COURT: What do you keep? How do you record your time?

MR. JULIEN: If your Honor please, our time which has been recorded here in the petitions sent up to you is largely based upon a reconstruction of my diary entries, the entries made of my associates, and the work itself which is produced as a result of that. Sometimes these are estimates of time.

THE COURT: Let me just understand clearly. You are telling me you do not --

MR. JULIEN: Day-by-day time sheets. We do not. We do not. Never have.

THE COURT: Is there any record showing time spent in terms of amounts of time? You don't keep records of that at all?

MR. JULIEN: No,your Honor.

MR. MacCRATE: Your Honor, I have here four documents that we received today, which are the sum total of the time that I understand is recorded in the records of Julien & Schlesinger.

MR. JULIEN: These are my diary entries, and some entries made by my associates.

THE COURT: I don't understand. I don't understand, in view of the cases that have come out in the Circuit, coming in and not having time records. This makes an awful lot of difficulty.

MR. JULIEN: It is not at all difficult, if your Honor please, for us, in the appropriate case, where we are required to, to approximate the time that has gone into each day. We know the day that we have spent on a matter. In some instances I have indicated an entire day has gone into a matter. There is no difficulty in our reconstructing the amount of time necessary to get out, for example, a trial brief for your Honor, or the preparation of witnesses for trial.

THE COURT: Of course you are not in the case that long.

MR. JULIEN: No, I was only in six weeks before, as you will recall, before the trial took place. And the deposition, with the amount of time that has gone into that, we can tell that. But I tell you right from the start that we don't keep daily time sheets.

THE COURT: Mr. Julien, all I am saying is this: When can you have to Mr. MacCrate everything covered by his subpoena? That of course means everything in diaries or correspondence or memos or whatever, with the kind of thing excised that I talked about, the substance of your advice, the substance of your thinking, excised. When can you have that material?

MR. JULIEN: So far as ours is concerned,

he already has them, my associate tells me. As far as Mr. Wasser's is concerned, there there is such intermingling that the excise job would be next to impossible. In some cases I am told by Mr. Jaroslawicz the name FLM will be the thing remaining, because the rest is confidential conversations had between him and some member of the firm.

THE COURT: What do you do, Mr. Wasser? When you talk to Mr. McKee, you mean you note down what you are talking about?

THE WITNESS: Yes.

THE COURT: In your diary?

THE WITNESS: Yes. When I tried to circumvent that, I found that I had papers all over. So I keep an exact diary of every telephone conversation, or when I do research or write letters or write Mr. Zolbert and so forth.

THE COURT: You would be able to testify in a deposition -- in other words, those things would be able to aid you in testifying as to what you did; right?

THE WITNESS: I have a separate list on a daily basis tied in with the diary with the hours spent. Like February 2 would have three hours on this case.

THE COURT: All I can say is that you are

applying for a lot of money in a fee, and you have got to back it up. Mr. MacCrate is entitled to see whatever backup there is; he is entitled to take a deposition or two.

I have not seen the records, and you just have to get at them. I think the burden is on you to support this fee application. I don't want to have anybody's time taken up litigating over phony issues, and I said that fairly strenuously. On the other hand, when people don't have time -- do you have time records?

THE WITNESS: I have time records, but they are very voluminous. It took me a very long time just producing the tapes. I collated it, based on conferences, research.

THE COURT: What form do your time records take?

THE WITNESS: They are chronological records, with the date, the name of the client, the hours spent, and the content of what I did.

THE COURT: So you have got --

THE WITNESS: It could be like five on a page.

THE COURT: But you have got time records about a particular matter, right?

THE WITNESS: Yes.

THE COURT: So you have got your time records.

THE WITNESS: Yes.

THE COURT: It is just a matter of organizing it.

THE WITNESS: Of organizing it, and the fact that it is all confidential, the material in the diary is confidential. Right after that I would have a listing of a tax fraud case and so forth.

We tried to just photograph the parts related to this case, and we just could not get off the ground . It would take a very long time.

MR. JULIEN: They can take Mr. Wasser's testimony. That won't be any problem. If he has his book before him, I am sure he can testify to that which they are trying to inquire about. And our work is so much related to the actual trial itself that I don't see any problem there either. We have not got years to examine.

THE COURT: The thing is that the number of hours spent by Julien & Schlesinger is not an awful lot, it really is not. It may require some delineation and there may be some problems. But they came in a short time before the trial, they worked through the trial, they were called in around the 1st of the year, and they did a long post-trial memo, which I am sure took a lot of work.

They have worked. But I don't find the time excessive there, and I don't know where that will end up.

We will have to end up estimating, doing something. All I am saying is that I hope everybody does not go to a vast amount of work on the fee application and then end up about where we are now.

As far as Mr. Wasser is concerned, I think it is a different problem. Julien & Schlesinger came in solely for the trial; they really have not done anything else. Mr. Wasser is a different problem, because he worked on the FTC discussions --

THE WITNESS: Starting right from September '72.

THE COURT: -- you worked as an accountant. That is a good deal more difficult, in my mind, and I still don't know how to sort all that out. But I will just say to both sides that there is a substantial amount of money sought for Mr. Wasser's services either as a lawyer or as an accountant, and that has got to be shown.

He has in his affidavit a pretty good breakdown. I don't know whether it is accurate or not, but it is a pretty good breakdown. So presumably he went through his records and got that up.

MR. JULIEN: That is right. Why doesn't Mr.

MacCrate --

THE COURT: So you are not starting afresh. All I am saying is that Mr. Wasser produce according to the subpoena as much as he can, bend over backwards. If stuff is technically confidential but of no importance, dish it out. Be as liberal as you can. That will advance us. Right?

THE WITNESS: Yes.

THE COURT: And then on your problem, when could Mr. Wasser have his material produced under the subpoena?

MR. JULIEN: Did you want it for a deposition or just in response to the subpoena?

MR. MacCRATE: I have an idea we would have to inquire in order to get explanations.

MR. JULIEN: Then inquire. Everything that is not privileged Mr. Jaroslawicz says that we can have to him within 48 hours.

THE COURT: There may be a problem. The way it shapes up is that I don't know what these documents look like and there may be a problem. But try to work together.

Mr. Wasser, again, just be as liberal as you can, get it over to Sullivan & Cromwell so that they can

work with it. If it is a piece of sensitive advice, of course -- but I am going to say this, that if they make a slip and produce something that is contrary to a position or something of that nature, this is not to be used on the merits of the case.

MR. MacCRATE: I understand that, your Honor.

THE COURT: Because that would be completely unfair.

With that understanding, do as well as you can. I think you should try to have the subpoenaes complied with this week, take your depositions next week, and we will just have to finally get together. You call me when you are ready and --

MR. JULIEN: Couldn't you do your depositions this week?

MR. MacCRATE: We can arrange that.

THE COURT: Please, I will rely on both of you, and you have the interest in getting expedition, Mr. Julien, so you push this and you tell me the minute you are ready for a final hearing.

MR. JULIEN: Yes, sir.

THE COURT: Get your depositions transcribed in daily copy and get the thing moving. All right?

MR. JULIEN: Yes, sir.

THE COURT: Thanks a lot.

MR. JULIEN: Do you want to put a date down for the adjourned date?

THE COURT: I will await your call.

MR. JULIEN: You will await my call. All right.

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